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Revisiting the Public Right to Fish in British Waters

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Abstract

The public right to fish is a creature of the common law. It underpins the statutory regime of fishing in England, and has influenced fisheries in other common law jurisdictions. With reform of fisheries on the political agenda, it is useful to consider the nature and extent of this right. By exploring and articulating the nature and extent of the right, its role in shaping the future regulation of fisheries in British waters can be better understood. This may become a future issue, especially when attention is already being devoted to the regulation and, perhaps more importantly, to the allocation of fisheries under management regimes that rely upon rights-based mechanisms.

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Introduction

Many fisheries around the world have been subject to significant reform or are undergoing major review. Such reform will seriously affect existing patterns of entitlement and regulation. This in turn is likely to generate resistance to change and, in some cases, legal challenge. At a time when the use of rights-based entitlements to regulate fisheries is receiving serious attention, there is growing interest in seeking out means of challenging what is perceived to be the privatisation of a public good.[1] The present paper reflects upon some historical aspects of fishing rights under the common law and considers how this may limit or influence future changes in the regulation of fisheries. In particular, it is concerned with the so-called public right to fish within the common law. In broad terms the public right to fish describes a form of entitlement to fish that cannot be removed by the Crown. It is thus suggestive of certain limits on the regulatory authority of the government to use certain instruments such as private property rights to regulate marine fisheries. More generally it might seem to embody the idea

[1] On the development of property rights generally, see A. Scott, *The Evolution of Property Rights* (Oxford, Oxford University Press, 2008). On some of the limits of property rights see R. Barnes, *Property Rights and Natural Resources* (Oxford, Hart Publishing, 2009).

that the resource is reserved for use in the wider public good or is reserved to ensure that certain public needs can be met.

This may seem to be a rather restricted field of enquiry, but it should be remembered that the English common law underpins many legal systems around the world. Moreover, the specific notion of a public right to fish has manifested itself repeatedly in institutions within common law legal systems, such as the public trust doctrine in US jurisprudence and fisheries law in Australia. This suggests that an understanding of the public right to fish under the common law is not or of merely limited concern to students of English legal history. Moreover, it is also clear that in any legal system, the baseline legal status of fishing rights may affect subsequent legal developments. Take, for example, the recent resort to human rights law, as illustrated by the recent United Nations Human Rights Committee (HRC) ruling against Iceland. All exploitable marine fish stocks to the limit of Iceland's 200-nautical-mile (nm) exclusive fishing zone are the common property of the Icelandic nation.[2] This means that fisheries have an important public function. Since 1975, many fisheries have been subject to rights-based management as individual quotas were introduced into the herring fishery.[3] This shift in regulatory focus has not been without its difficulties and there have been numerous challenges to both the system and the particular allocation of quotas.[4] This came to international prominence in 2007, when the HRC ruled on the legality of aspects of the Iceland's fisheries management regime.[5] In 2001 two fishermen, Erlingur Sveinn Haraldsson and Orn Snaevar Sveinsson, challenged the quota system after they purchased a boat but were unable to obtain a fishing quota. Although they could lease a quota, this was at such a high rate as to make fishing wholly unprofitable. They decided to fish without a quota and challenge the ITQ system in the Icelandic courts. After the Icelandic Supreme Court ruled that the quota system was constitutional, they filed a claim with the HRC. Much of the issue turned on whether the introduction of privately held quotas was in the public good. For example, Iceland argued and the authors of the complaint accepted that measures to limit over-fishing were necessary, and that the public interest required restrictions on the freedom of individuals to engage in commercial fishing.[6] However, it was also asserted that such restrictions should be of a general nature, reasonable, and that all persons meeting such a requirement should have an equal chance of access to quotas. Although not fully reasoned, the HRC ruled that 'the property

[2] Article 1 of the Fisheries Management Act 2006.
[3] The Fisheries Management Act 1990 placed all commercial fisheries under a complete system of ITQs (Fisheries Management Act, No. 38, 15th May 1990). This Act was re-issued as the Act on Fisheries Management 2006, which is a consolidated version of fisheries legislation since 1990 (Act 116 of 10 August 2006).
[4] Barnes, above note 1, pp. 354-5.
[5] *Haraldsson and Sveinsson v. Iceland of 24 October 2007*, Communication *No. 1306/2004*
[6] *Ibid*., para 6.6.

entitlement privilege accorded permanently to the original quota owners, to the detriment of the authors, is not based on reasonable grounds.' [7] Furthermore, Iceland is 'under an obligation to provide the authors with an effective remedy, including adequate compensation and review of its fisheries management system'. [8] It is not clear how far-reaching the decision of the HRC will be, but it seems that some reform of the fisheries management regime will be required to ensure Iceland's compliance with general human rights obligations. The case shows how much legal context matters, and also how the previously public character of a resource imposed certain limits on the subsequent regulatory shape of entitlements.

The paper is divided into four sections. In the first part, some brief observations are made on the importance of historical ideas in the process of legal change. In the second part, the treatment of the legal nature of fishing rights by leading commentators is briefly considered. This is then examined in light of its treatment in the common law. In part four, the nature and extent of this right as it currently operates are examined. Finally, some brief observations are offered on its potential role as a regulatory tool. However, these are points that will require more careful consideration and merit more detailed treatment than is possible in the present paper.

Some Reflections on the Role of Historical Rights

The history of law plays a vital role in the process of law reform. Of course change may be motivated by multiple social, economic and economic reasons, but when it occurs in law, it must also be evaluated in light of what is legally permissible and desirable. So when we seek to reform the law, we measure the change against the yardstick of what the law allows and what will be deemed to be legally acceptable. This process of weighing up the possibility and desirability of legal change is an incredibly difficult but necessary process. Law is the product of many tensions. For example, the law of the sea is in part a result of the tension between *mare liberum* and *mare clausum*, the tensions between coastal state and flag state authority, the tensions between inclusive and exclusive claims to oceans use, the tensions between certainty and flexibility. There are many other complex tensions, such as those between commercial and environmental concerns, and between development and conservation. The law of the sea, as a process, seeks to mediate between these tensions and to accommodate as far as possible the range and quality of interests possessed by the principal actors and subjects involved in oceans use. Law is a dynamic process that evolves to meet new challenges presented by changing knowledge and circumstance. This process is massively complex, having evolved over hundreds

[7] *Ibid*., para 10.
[8] *Ibid*., para 12.

of years to meet innumerable circumstances. For the student of the law of the sea, one small window into this complexity is to recall the view of the United Nations Convention on the Law of the Sea (LOSC or the Convention)[9] as a package deal, that is to say the product of legal and political negotiations that has resulted in a careful balance of the interests between States and groups of States in respect of the Convention's substantive rules.[10] Of course, the LOSC is merely one, albeit significant, part of the law of the sea, which in turn is but one part of general international law, which is in turn one dimension of law that continues to operate at regional and domestic levels. Legal change may be politically, or socially, or economically, or scientifically driven, but it must still occur through legal channels. As such, the case for or against change will be couched in legal terms, at least in part. The way in which law can produce complex balances of rights and responsibilities is well illustrated, even over a short time, by the case of *Haraldsson and Sveinsson v. Iceland* noted above.

Just as commentators warn against trying to unpick the LOSC, care must be taken in trying to adjust any legal relationship, for each legal relationship forms part of a complex array of interests that are affected by change. For example, if a fishing practice is shown to be unsustainable, then it may be prohibited or qualified. This in turn may result in fishing effort being channelled into other areas or towards other species. It may generate political and economic pressure to compensate fishermen for lost income. It may increase pressure on welfare mechanisms. This is to say nothing of the complex impacts that may occur within the ecosystem itself. So far this might seem to read against a caution against change. It is a warning certainly, but perhaps only to pay heed to risks of careless disregard of legal context. The following review of the public right to fish in the common law explores one strand of legal development and indicates the complexity that forms part of the legal context.

As might be expected when we begin to explore the Byzantine development of the common law, the public right to fish is not a straightforward matter. Indeed, the leading commentary on the development of fisheries law in Great Britain, Moore and Moore's *The History and Law of Fisheries* (1903), begins by noting that there is considerable confusion in the law.[11] Misconceptions about facts have arisen and undue weight has been attributed to the dicta of ancient writers. This has resulted in the 'enunciation of principles very often inconsistent with the true facts as to the existence, nature and attribute of fisheries'.[12] This is, as shown below, particularly the case in respect of the public right to fish. Furthermore, the

[9] United Nations Convention on the Law of the Sea 1982. 1833 UNTS 3; (1982) 21 ILM 1261.
[10] See H. Caminos and M. Molitor, 'Progressive Development of International Law and the Package Deal' (1985) 79 *AJIL* 871.
[11] S.A. Moore and H.S Moore, *The History and Law of Fisheries* (London, Stevens and Haynes, 1903), pp. v-vii. Hereinafter, 'Moore and Moore'.
[12] *Ibid*., p. vi.

concepts used to describe public and private fishing rights are not always used consistently.[13] This makes it difficult to plot the precise development and content of the public right to fish. Unlike international fisheries, there have been few detailed considerations of fishing rights in domestic law. In 1875, Hall examined some fisheries law as part of his broader treatise on rights of the sea shore.[14] In 1904, the American writer Henry P. Farnham provided a quite detailed account of fisheries.[15] The most recent edition of Wisdom's Law of Watercourses devotes some attention to the nature and extent of the right, although this is necessarily succinct as it is merely one aspect of a more general examination of the law relating to watercourses.[16] Appleby has been keen to raise awareness of the right, but is concerned that it can be used to sustain a culture of overfishing.[17]

Despite some complexity or ambiguity in the nature and extent of the public right to fish, it is possible to construct some general delineations of the right in the common law and the key academic commentaries on fishing rights. By providing an account of the public right to fish we are able to gauge the extent to which potential regulatory change, such as the introduction of stronger rights-based entitlement in fisheries, can be accommodated within the common law.

A Brief Survey of Commentaries on Marine Fisheries in the Common Law

Prior to Moore and Moore, there was no systematic doctrinal analysis of the actual origins and development of the public right to fish. The earliest legal authorities tended to ignore marine fisheries. Thus Johnston notes that the Romans had little interest in maritime law or fisheries, other than as ancillary to assertions of military authority.[18] Roman law merely regarded fish as *ferae naturae* which were free to capture by all, and this exerted a strong influence on both civil and common law doctrines. Under feudal law, authority was derived from ownership of land and this could not be applied to the sea.[19] This perpetuated a *de minimis* approach to fisheries regulation. Of course, feudal law did admit private grants of fishery rights in rivers and limited

[13] *Ibid*., p. xxxvii; Also, *Malcomson* v. *O'Dea* (1862) 10 HL 593, per Wiles, J.
[14] R.G. Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea-Shores of the Realm* 2nd ed. (William Waler, London, 1875).
[15] Henry P. Farnham, *The Law of Waters and Water Rights* (Rochester, The Lawyers Cooperative Publishing Company, 1904).
[16] W. Howarth, *Wisdom's Law of Watercourses* 5th ed. (Crayford, Shaw & Sons, 1992), esp. 176-82.
[17] T. Appleby, 'The public right to fish. Is it fit for purpose?' (2005) 16 *Water Law* 201. This generated some response. See P. Scott, 'Another view of the public right to fish – and the question of regulation or ownership' (2008) 19 *Water Law* 37; T. Appleby, 'Response to "Another view of the public right to fish – and the question of regulation or ownership"' (2008) 19 *Water Law* 41.
[18] D.M. Johnston, *The International Law of Fisheries* (New Haven, Yale University Press, 1965), pp. 158-9
[19] See P.T. Fenn, *The Origin of the Right of Fishery in Territorial Waters* (Cambridge, Harvard University Press, 1926), pp. 66-7.

coastal waters, and as the monarchs sought to bestow privileges on favoured subjects, such rights were generally quite limited in marine areas. This approach was largely consistent with predominant natural law doctrines which favoured the equal rights of all men in certain commons. When the matter was considered in legal writing, it was briefly done, and usually as part of a wider treatise on maritime law or, indeed, the common law in general. Henry de Bracton, writing his treatise on the Laws and Customs of England in the 13th century, merely asserted that the seas are common to all as of natural right, and this extends to the right of fishing in ports and rivers.[20] This seems to be a simple assertion drawn directly from Roman law without other authority. In 1569, Thomas Digges asserted the crown's right of property in the sea and seabed, observing that Kings have suffered fishermen to use the seas under the *jure gentium*.[21] It is unclear how far this approach became accepted. For example, it was rejected by Plowden, a leading lawyer, in *Sir John Constable's case*, but accepted by Sir John Dee.[22]

Taking a broader perspective on maritime authority in general, it may be noted that prior to the seventeenth century it was not at all clear that States had the right or desire to claim any authority over marine spaces and so guarantee any rights of fishing for their subjects. Certainly, as is noted below, there is evidence of claims to public and private fishing rights dating back to the early 17th century, but there was little coherence to such claims.[23] Later decisions seemed to assume a degree of coherence in the law or attempted to retrospectively impose a sense of order on the pre-existing uncertainty. It was not until the 16th century that States began to assert limited jurisdiction over coastal waters, thereby creating the conditions for more extensive domestic fishing rights. And it was not until the 17th century that writers such as Grotius and Selden devoted any time to considering the regulation of coastal spaces and presenting a systematic account of rights and duties therein, and of their philosophical or legal basis. From this point on more coherent accounts of fishing rights, which reconciled domestic practices with the limits of State authority, were possible. In short, the vast scale of the oceans, the general absence of conflicts between users which might generate a political motive for regulation, the practical difficulties of asserting authority and the absence of a clear juridical basis for exclusive claims combined to produce a general liberty to use the seas. As Judge Alvarez stated in his Individual Opinion in the *Anglo-Norwegian Fisheries case*, '[f]or centuries, because of the vastness of the sea and the limited relationships between States the use of the

[20] *De Legibus et Consuetudinibus* (trans. T. Twist)(London, Longman and Co.), p.57.
[21] T. Digges, *Arguments proving the Queens Maties Propertye in the Sea Landes and Salt Shores Thereof* (1569), reprinted in S.A. Moore, *A History of the Foreshore and the law relating thereto. With a hitherto unpublished treatise by Lord Hale, Lord Hale's "De Jure Maris," and Hall's Essay on the Rights of the Crown in the Sea-shore*, 3rd ed. (1888), p. 185.
[22] Sir John Dee, *General and Rare memorials pertaining to the Perfect Arte of Navigation* (1577).
[23] Moore and Moore indicate the existence of tidal fisheries as far back as the Domesday book in the 11th century. However, this appears to be simply evidence of a practice. The actual legal basis of such fisheries is not at all clear. See above note 11, pp. 1-5 and 6.

sea was subject to no rules; every State could do as it pleased'.[24] There were limited exceptions to this, as noted below, but these tended to be *ad hoc* and highly localised situations.

Matters began to change in the early 17th century. The colonial ambitions of European powers generated considerable interest in the legal regime of the seas, and the legitimacy of claims to inclusive or exclusive authority. Grotius, acting on behalf of the Dutch East Indies Company, sought to defend the freedom of the Dutch to navigate the oceans and advanced his theory of *mare liberum* against the exclusive maritime dominion asserted by Spain and Portugal. The British soon entered this debate, initially as a means of defending the interests of domestic fishermen against the more effective Dutch fishing fleet that was thriving in the North Sea, and then using fisheries as the foundation of its maritime wealth and power.[25] A strong domestic fishery could supply the skill and experience necessary for the development of a powerful navy. Among the first jurists to assert a coastal State's claim to exclusive authority over fisheries was the Scots lawyer William Welwood in 1613, who argued that overfishing demanded some means of reserving coastal fisheries for the coastal State.[26] As he wrote:

> 'the primitive and exclusive right of the inhabitants of a country to the fisheries along their coasts; one of the principal reasons for which this part of the sea must belong to the littoral State being the risk that these fisheries may be exhausted as a result of the free use of them by everybody.'[27]

His argument was intended to justify British claims against other States, rather than designate fisheries as either public or private. Of course, a claim to an exclusive fisheries right against other States could only have persuasive force if the right was vested in the authority of the King rather than in the ordinary people. Claims of individuals could not be made against foreign powers, but rights of the King could. The King was the external representation of the State. The important point to note is that the strength of any rights or liberty of private persons for fishing was contingent upon the Crown's ability to defend such claims externally. Thus fishing rights were intimately related to the assertion of Crown authority in their formative stages.

The 17th century witnessed a marked outpouring of legal opinions devoted to defending the claims to Crown authority over coastal waters. In a series of lectures delivered at Grey's Inn, Serjeant Callis argued for a *Mare Anglicum* on the basis of sovereignty, jurisdiction, property and possession.[28] In 1633, Sir John Burroughs wrote *The Sovereignty of the British Seas* which forcefully argued for English dominion over the seas, drawing upon an array of documents. However, Fulton notes

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[24] *Anglo-Norwegian Fisheries case* [1951] ICJ Rep. 116, 146.
[25] See T.W. Fulton, *The Sovereignty of the Sea* (London, Blackwood, 1911), chapters IV and V.
[26] See M.J van Ittersum, '*Mare Liberum* Versus the Propriety of the Seas?' (2006) *Edinburgh Law Review* 239.
[27] W. Welwood, *An Abridgment of All Sea Laws* (1613), chapter 26.
[28] R. Callis, *Reading of the famous and learned Robert Callis, esqr., upon the Statute of Sewers* (1622) 23 Hen. VIII., c. 5, 16. (Fourth ed. by W.J. Broderip, 1824).

that the treatise was more a list of claims and devoid of reason based upon law.[29] Moreover it was not published until 1651 and so was limited in its initial influence. John Selden assumed the mantle and presented the most compelling defence of English authority over coastal waters in his treatise *Mare Liberum* (1635).[30] Unlike Welwood, Selden was more concerned with maritime authority in general, rather than the limited matter of fisheries. That said, the need to secure exclusive State authority over fisheries was necessary for Selden. The sea, 'by reason of other men's Fishing, Navigation and Commerce, becomes the wors for him that owns it and others that enjoie it in his rights; so that the less profit ariseth, then might otherwise bee received therby.'[31] For a time, the book assumed both legal and political significance because its publication coincided with Charles I's assertions of maritime authority against European nations. Its subsequent legal authority was strengthened through the approval of later writers such as Coke,[32] Godolphin,[33] Zouche,[34] Codrington,[35] Meadows,[36] and Hale, discussed in more detail below.

Although freedom of the seas became the dominant principle of maritime relations between States, it was yet conceded that a limited band of coastal waters was subject to the exclusive authority of the coastal States.[37] This allowed for the development of more sophisticated domestic law rules pertaining to coastal fisheries. In the common law the most important and detailed treatment of the subject was provided by Lord Hale, who wrote *De Jure Maris circa* 1670.[38] As the most eminent judge of his generation, unsurprisingly, Hale's legal opinions became highly authoritative in the common law courts and references to *De Jure Maris* or Hale are a common feature of many 18th- and 19th-century decisions concerning fisheries in tidal waters.[39] Hale states the origin of the public right of fishing in tidal waters to be in the King's ownership of the soil of the sea.[40] He goes on to note that '... the common people of England have a regular liberty

[29] Fulton, above note 25, p. 366.
[30] J. Selden, *Mare Clausum* (1635), translation by M. Needham (London, 1652).
[31] *Ibid*., bk 1, p. 141.
[32] Although Coke's Fourth Institute was published posthumously, it does however give a more considered view of the nature of the Crown's rights of property in the English seas. Sir E. Coke, *The Fourth Part of the Institutes of the Lawes of England* (1644), c. 22, 142.
[33] J. Godolphin, *A View of the Admiral Jurisdiction* (1661).
[34] R. Zouche, *The Jurisdiction of the Admiralty of England Asserted* (1663), p. 20.
[35] R. Codrington, *His Majesty's Propriety, and Dominion on the Brittish Seas Asserted: together with a true account of the Neatherlanders insupportable insolencies* (1665), p. 1.
[36] Sir P. Meadows, *Observations Concerning the Dominion and Sovereignty of the Seas* (1689), p. 42.
[37] Barnes, above note, 1, pp. 183ff.
[38] Hale's treatise was actually part of a larger tract in three parts: '*Pars prima. De Jure Maris et Branchiorum eiusdem. Pars Secunda. De Portibus Maris. Pars tertia. Concerning the customs of goods imported and exported*'. *De Jure Maris* is reprinted in Moore, above note 21.
[39] See for example *Bagott* v. *Orr* (1801) 2 B. & S. 472. Lord Blackburn quotes extensively from Hale in *Neill* v. *Duke of Devonshire* (1882) 8 App. Cas. 135; *Reece* v. *Miller and others*, (1882) 8 QBD 626, per Grove, J.; *Henry Blake and Johyn Goodman, the Younger* v. *The Mayor and free Burgesses of the Borough of Saltash*, (1882) 7 App. Cas. 633, per L. Blackburn (651); *R.* v. *Musson*, 8 E. & B. 900, 27 L. J. (M.C.) 100.
[40] *De Jure Maris*, p. 378.

of fishing in the sea or creeks and arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, or creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty.'[41] This much differs little from the above commentaries, but stresses that the right of the King generates a common right of fishing. This position is then little considered by writers, or, indeed, challenged, until the 20th century.

Origin of the Public Right to Fish

As the above review of legal commentaries reveals, the position developed that both the public right of fishing and any private exception to this were rooted in the Crown's ownership of the sea. Given such assertions of a right of ownership, it is important to see the extent to which this was manifest in domestic law. The point of origin of this right in law is not entirely clear, but it is often mistakenly attributed to the Magna Carta. For example, in the recent High Court decision in *Anderson* v. *Alnwick District Council* (1993), Evans LJ stated that '[b]efore Magna Carta, the Crown made grants of 'several fisheries' (private fishing rights) in areas of tidal waters, but this was regarded as an abuse which Magna Carta ended in 1215.' [42] However, the Magna Carta says nothing directly about private or public rights in marine fisheries. And it is certainly clear that it makes no such prohibition on private rights. The only relevant provisions of the charter are Chapter 23 and Chapter 16 (of the third revision). Chapter 23 reads: '*Omnes kidelli decetero deponantur penitus per Tamisiam et Medeweiam et per totam Angliam, nisi per costeram maris*.' This translates as 'All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.' The provision was apparently designed to protect free navigation on rivers, hence the requirement to remove obstacles to navigation on rivers, but not the sea-coast, where weirs would not necessarily impede navigation.[43] Farnham, a leading US scholar who researched the development of waters rights extensively under the common law, notes that the Charter simply cannot sustain the interpretation placed upon it.[44] The other provision relied upon as limiting the Crown's right to grant a several fishery (private property in a fishery) is attributed to Blackstone, who stated that exclusive rights of fishing in "public" rivers could not 'at present be granted, by the express provision of *magna carta,* c. 16'.[45] This assertion is not supported by the actual text of chapter 16, which translates as: 'No river banks shall be guarded (placed in defence – *defandantur*) from

[41] *Ibid.,* p. 377.
[42] *Anderson* v. *Alnwick District Council* [1993] 3 All ER 613, per Evans LJ at 621.
[43] In support of this view, see Hale, *De Jure Maris*, chapter 3.
[44] Farnham, above note 15, para 369.
[45] W. Blackstone, *Commentaries on the Laws of England,* vol. 2 (Oxford, Clarendon Press, 1766) at 417.

henceforth, but such as were in defence in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time.'[46] It is doubtful that this can be read as precluding the grant of several fisheries, and Farnham attributes the error to Coke, who incorrectly read the provision as affecting the grant of private fisheries.[47]

If the attribution of the public right of fishing to the Magna Carta is a legal fiction, then how far back can the right be traced as a matter of law? Most authorities and judges attribute the rule to the House of Lords in the seminal case of *William Malcomson* v. *John O'Dea and Others* (1863).[48] As noted below, a number of earlier cases did uphold the right, but as decisions of lower courts they are not regarded as important. *Malcomson* is authority for the position that the Crown cannot grant a several fishery since the Magna Carta, and that in the absence of any such proven claim there remains a general public right of fishing on tidal waters.[49] The limitation on the creation of private fisheries is not complete. Thus *Malcomson* partially circumvents its own prohibition on new grants by permitting exclusive rights to be acquired by prescription, through evidence of long-standing exclusive use of a fishery, which cannot be traced back to a time subsequent to the Charter.[50] Interestingly, the law report actually records the view that the Magna Carta could not sustain the meaning placed upon it.[51] However, in delivering the unanimous opinion of the court, Mr Willes, J, stated that: 'The soil of "navigable tidal rivers," like the Shannon, so far as the tide flows and reflows, is *prima facie* in the Crown, and the right of fishery *prima facie* in the public. But for the Magna Carta, the Crown could, by its prerogative, exclude the public from such a *prima facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great Charter left untouched all fisheries which were made several, to the exclusion of the public, by Act of the Crown not later than the reign of Henry II.' Although earlier cases touched upon this matter, it is more than arguable that this was at least an example of judicial law-making. Of course, this would only be acceptable if the outcome was also politically desirable, and it seems clear that by the mid-nineteenth century there were strong social, economic and political reasons to support a strong public fishing industry absent any limitations under private law. Britain was at the forefront of the industrial revolution and needed to satisfy the appetites of a growing population.[52] Knauss notes that in 1866 a Royal Commission famously repealed in whole or in part 65 pieces of legislation that limited fishing efforts. Capturing the free market

[46] Translation from Farnham, above note 14, p. 1369. The provision was added in 1225.
[47] Farnham, above note 15, p. 1370, para 369.
[48] (1863) 10 HLC 593; 11 ER 1155. (Hereafter *Malcomson*).
[49] See Moore and Moore, above note 11, p. 8-18.
[50] *Malcomson* v. *O'Dea*, at 618. Also *Duke of Northumberland* v. *Houghton*, (1870) LR 5 Ex. 127; *Tighe* v. *Simnot* [1897] Ir. R. 140.
[51] Above note 48, at 603.
[52] J.A. Knauss , 'The Growth of British Fisheries During the Industrial Revolution' (2005) 36 *Ocean Development and International Law* 1-11.

political context rather nicely, he quotes Thomas Huxley, President of the British Royal Society and one of the most influential figures in the regulation of British fisheries of the time:

> 'Now every legislative restriction means . . . a simple man of the people earning a scanty livelihood by hard toil, shall be liable to fine or imprisonment for doing that which he and his fathers before him have, up to this time, been free to do. If the general interest clearly requires that this burden should be put on the fisherman—well and good. But if it does not—if indeed there is any doubt upon the matter—I think the man who has made the unnecessary law deserves a heavier punishment than the man who breaks it.'[53]

Moreover, the perpetuation of public rights to fish was wholly consistent with a more expansive fishing effort on the high seas and, indeed, off the coasts of other countries.

Political demands aside, as noted above, a number cases preceding *Malcomson* assert or imply the existence of a public right of fishing. Most such cases dealt with navigable rivers, rather than the sea, but several held that the public nature of fishing rights on such rivers is the same as that on the open sea. The earliest noted appears to be the *Case of the Royal fishery of the river Bann in Ireland* (1610) which concerned fisheries in the tidal waters of a river.[54] Here the Court confirmed the pre-existing nature of Crown rights in the soil and fishery of a river, which could be granted to riparian landowners. It may be noted that the approach of the court in this and other cases was that the right was deemed to exist before the dispute in law, rather than emerge as a remedy of the court. Thus, in *Lord Fitzwalter's case* (1673), the right is implicitly accepted in the court's reasoning about the existence of a burden on a person claiming an exclusive right in a tidal river.[55] In *Warren* v. *Matthews* (1703), Sir John Holt held that every subject of the common right may fish with lawful nets in a navigable river as well as in the sea.[56] Moreover, the court held that the Crown cannot bar such a right by the grant of a private fishery. However, this position is somewhat misleading since in the same case the court sought to allow such a title to be tested and it runs counter to the general line of other authorities, which accept exclusive fishing rights by way of ancient grant or usage.[57] In *Ward* v. *Cresswell* (1741), as quoted in the later case of *Bagott* v. *Orr*, the Court held that 'all the subjects of England of common right might fish in the sea; it being for the good of the commonwealth, and for the sustenance of all the people of the realm'.[58] In *Carter* v. *Murcot* (1768), the public right was again implicit in the need for the plaintiff to bear the burden of showing the existence of a

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[53] *Ibid*., p. 4. For the original see *The Fisheries Exhibition Literature* (London, William Clowes and Son Ltd, 1884), vol. 4, p. 18.
[54] (1610) Dav. Rep. 55; Salk. 137
[55] (1673) 1 Mod. 106. (1673) 84 ER 766.
[56] (1703) 6 Mod. 73, (1703) 87 ER 831.
[57] This point was explicitly reviewed by the US Supreme Court in *Martin* v. *Waddell's Lessee*, (1842) 41 US 367, 425.
[58] (1741) Willes' Rep. 265.

several fishery on a tidal river.[59] *Mayor of Orford* v. *Richardson* (1791) implicitly confirms the right to fish, although the Court was focused mainly on the procedural aspects of how public and private claims are presented.[60] One of the most important cases was *Bagott* v. *Orr* (1801), which concerned the *prima facie* right to take fish between the high- and low-water mark and it is one of the few cases to actually articulate upon the nature of the right.[61] As the court stated: 'The right of fishing in the sea is acknowledged by all nations; it is universal, and part of the law of nations'.[62] Interestingly, the court was able to draw upon the now generally accepted authority of international law, and general agreement about the freedom to fish on the high seas, to justify a matter of domestic law. This seems to draw upon the idea advanced by Grotius that the seas are inexhaustible in their nature and cannot be improved upon by subjecting them to exclusive rights. The court also explicitly drew upon the authorities of Bracton and Hale, and shows the growing influence of doctrine in the development of the principle of a public right to fish. Soon afterwards, *Rogers and Other* v. *Allen* (1808) restated, indirectly, the common right of the King's subjects to fish in the sea, and noted that any grant of a several fishery must be one that dated back to the time of Henry II.[63] Again, *Duke of Somerset* v. *Fogwell* (1826) confirms that a franchised fishery could not be established after the Magna Carta.[64] Although this appears to suggest a reasonably coherent basis in law for the decision in *Malcomson, t*he restrictions of the Magna Carta were not restated in all cases.[65] However, these exceptional cases seem to be instances of limited reasoning, rather than any explicit acknowledgement that there exists a general right to grant several fisheries in tidal waters.

Since *Malcomson,* the public right to fish has been carefully observed by the courts, although it has been little developed, and most of the case law on fisheries in tidal waters has been notoriously deficient in its discussion of this point. Indeed, there appears to be a degree of retrenchment from the high point of *Malcomson.* In *Neill* v. *Duke of Devonshire*, there is an indication that the decision in *Malcomson* was not being properly understood.[66] Thus Lord Blackburn stressed that '[i]t is not law, and this can never be too often repeated, that the Crown cannot grant a several fishery in tidal waters since Magna Carta. Such a statement is illusory and contrary to law."[67] Such a fishery could have been created if the fishery existed prior to the Charter. Furthermore, the court was carefully to uphold the core *ratio* of Malcomson, that 'no

[59] (1768) 4 Burr. 2163, (1768) 98 ER 127.
[60] (1791) 4 TR 438; (1791) 100 ER 1106.
[61] (1801) 2 Bos. & Pul. 472; (1801) 126 ER 1391.
[62] Ibid, at 1393, citing Hugo Grotius.
[63] (1808) 1 Camp. 309; (1808) 170 ER 967. (citing *Ward* v. *Cresswell* and *Bagott* v *Orr*).
[64] (1826) 5 B. & C. 875; 108 ER 325.
[65] See for example, *Lord Fitzwalter's case*, above note 55; *Warren* v. *Matthews* above note 56; *Carter* v. *Murcot*, above note 59.
[66] Above note 39.
[67] *Ibid*., at p. 180.

new exclusive fishery could be created by royal grant, though all fisheries were left untouched which were made several to the exclusion of the public not later than the time of legal memory'.[68] Lord Blackburn cited Hale with approval to show that although the King exercised ownership rights over the seas, the public also enjoyed a 'public common of piscary' that could not be excluded unless a long-standing private right of fishing had been enjoyed.[69] The court then went on to state those circumstances in which evidence of a private fishery could be adduced.

Other relevant cases include *R*.v. *Stimpson* (1863), which held that a right of fishing in a tidal navigable river is *prima facie* public.[70] In *Murphy* v. *Ryan* (1868), the court stated the right to be limited to the tidal parts of rivers. It did not apply to non-tidal parts of the river.[71] The court in *Bloomfield* v. *Johnston* (1868) denied the right's application to Loch Erne because it was not tidal.[72] Interestingly, *Mayor and Corporation of Carlisle* v. *Graham and another* (1869) confirmed the limitations supposedly introduced by the Magna Carta, but held that when a tidal river changes its course, the new channel does not carry with it the several fishery on the old channel.[73] In *Brew* v. *Haren* (1877), Lawson, J. stated that the 'right of the public to take [seaweed] when floating … is as clear as their right to catch fish in the ocean.'[74] It thus confirmed the public right to fish and extended it to ancillary or related activities. Despite some earlier reservations about the reasoning in *Malcomson*, Lord Blackburn eventually accepted the rule in *Malcomson* in *Goodman and another* v. *Saltash Corporation* (1882).[75]

During the twentieth century the public right of fishing was less frequently the object of litigation. In part this is likely to be the result of the fact that since the mid-19th century the commercial exercise of fishing rights was effectively put on a statutory basis.[76] Several cases reaffirmed the right, including *Lord Advocate* v. *Wemyss* (1900),[77] *Truro* v. *Rowe* (1902),[78] *Parker* v. *Lord Advocate* (1904),[79] and *Fitzhardinge* v. *Purcell* (1908).[80] In 1914, the Privy Council provided one of the more detailed modern reviews of the public right in *Attorney-General of*

[68] *Ibid*., p. 178.
[69] *Ibid*., p. 177.
[70] (1863) 27 JP 678, 4 B & S 301.
[71] (1868) IR 2 CL 143. 'But whilst the right of fishing in fresh water rivers in which the soil belongs to the riparian owners is thus exclusive, the right of fishing in the sea, its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris*, and so to belong to all the subjects of the Crown, the soil of the sea, and its arms and estuaries and tidal waters being vested in the sovereign as a trustee for the public.' (at 149.)
[72] (1868) Ir . Rep 8 Cl 68.
[73] (1869) L.R. 4 Ex. 361, per Kelly, CB at 367-8.
[74] (1877) 11 IR CL 198.
[75] (1882) 7 App. Cas. 633; [1881-1885] All ER Rep 1076, at 1085.
[76] See especially, the Sea Fisheries Act 1843 and the Sea Fisheries Act 1868.
[77] [1900] AC 48.
[78] [1902] 2 KB 709.
[79] [1904] AC 364.
[80] [1908] 2 Ch. 139.

British Columbia v. Attorney-General of Canada.[81] Viscount Haldane noted that 'the legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them'.[82] Haldane compared the right to fish to the right of navigation, noting that the Crown regarded itself as '*parens patri*', responsible for protecting the rights of the nation.[83] From this the Crown's protective role evolved into an enforceable right for subjects of the Crown.

In *Stephens* v. *Snell* (1939), one of the few cases dealing with the enforcement of exclusive rights against the public right of fishing, the plaintiff succeeded in a case against a fisherman for trespass on his several fishery in the tidal waters of Axmouth harbour.[84]. Judicial consideration of the issue then lapsed for a long while until the public right of fishing was strongly reaffirmed by the High Court in *Anderson* v. *Alnwick District Council* (1993).[85] In the context of justifying the extension of the rights to the matter of digging bait, the court stated: 'We base our decision, however, on wider grounds. Many of the authorities show that the underlying reasons for the public rights to navigate and to fish were economic. Sea fishing from boats or from the land was a vital source of food for many coastal communities. The public right to take fish from the sea and tidal waters was jealously guarded from Magna Carta onwards.'[86] An equally firm approach to protecting public rights was upheld in *Adair* v. *National Trust* (1998), when Girvin, J. stated that at 'common law there is a public right to take fish from the tidal waters around the Kingdom. The common law right extends to the tidal reaches of all rivers and estuaries and in the sea and arms of the sea within the territorial limits of the Kingdom.'[87] The position in *Malcomson* was accepted without hesitation. More recently the right was acknowledged in *Jan de Nul (UK) Ltd* v. *NV Royale Belge* (2000),[88] and *Isle of Anglesey County Council* v. *Welsh Ministers and others* (2009).[89] In the former, the question arose as to whether or not an interference with a public right of fishing constituted a public nuisance. The court restated the simple extent of the right as a 'right to fish in tidal waters is a right to take fish, including shellfish, by whatever means are considered effective, subject to any statutory restrictions'. Interestingly, the High Court held that interference with such a right is capable of

[81] [1914] AC 153, at pp. 168-71. The existence of the right was later reaffirmed in *Attorney-General for Canada* v. *Attorney General for British Columbia and other* [1930] AC 111.
[82] *Attorney-General of British Columbia* [1914], *ibid*., at p. 169.
[83] *Ibid*.
[84] [1939] 3 ALL ER 622.
[85] Above note 42.
[86] *Ibid*., 624.
[87] *Adair* v. *National Trust for Places of Historic Interest or Natural Beauty and another* [1998] NI 33.
[88] [2000] All ER 1148, at para. 69.
[89] [2009] EWCA Civ 94.

constituting a public nuisance.[90] In the latter case, the court also accepted the existence of the right, and indicated that a landowner could not 'carry out works which "substantially interfered" with the public's fishery rights'.[91] However, the precise extent of this was not developed any further.

The attempt to tie the public right of fishing to the Magna Carta appears to be an example of judicial law-making and it is doubtful that this can be sustained. At the very least it is a case of the court reading a political intention into a law far beyond what the text is capable of supporting alone. However, the right can be traced back in the common law at least as far back as 1610, and may have received earlier judicial recognition. Regardless of any concerns about the basis of the rule in *Malcomson*, it has since been accepted as good law. As Viscount Haldane stated in *Attorney-General of British Columbia v. Attorney-General of Canada*: 'Since the decision of the House of Lords in *Malcomson v. O'Dea*, it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation'.[92] In light of this general proposition, the issue is not so much the existence of a general public right to fish, but rather whether this has been lawfully restricted in any particular area, and the extent to which it can be varied, lost or regulated. There appears to be evidence in the Domesday Book of many exclusive tidal fisheries. However, the true extent of these is difficult to gauge. The fisheries were not delimited, and may refer to fishing by more limited means, rather than be evidence of a widely drawn private right.[93] Hall considers such grants to be rare, and limited to those places capable of sustaining exclusive possession.[94] This seems to imply that such private fisheries were closely connected to the holder's capacity to exercise some degree of practical exclusion of others from the fishing ground. They also appear to be limited to estuaries and waters around certain towns.[95] There is little evidence of such rights extending to tidal waters at a distance from the shore. However, this does raise interesting questions about the relationship between the public right to fish and the freedom to fish on the high seas.

The Nature of the Public Right to Fish

[90] Above note 88, para 69
[91] Above note 89, para 68.
[92] [1914] AC 153, at 170.
[93] See Moore and Moore above note 11, p. 4.
[94] Above note 14, p. 5.
[95] See for example. *Henry Blake and Johyn Goodman, the Younger* v. *The Mayor and free Burgesses of the Borough of Saltash*, (1882) 7 App. Cas. 633.

General acceptance of the right and its material extent

As discussed above, there is legal recognition, and a general acceptance among expert commentators as to the existence, of the public right to fish.[96] Unfortunately, this is often considered in short measure. In 1875, Hall described the 'public or general right of fishing in the sea' as 'a beneficial privilege enjoyed by British subjects since time out of mind'.[97] He goes on to state that the precise origins, whether a reservation by the people of a right, or the public grant from the King, are immaterial.[98] It is suggested that the nature of the original right is linked to the scope of the right. In this context one general theme is important – the link between ownership of land and fishing rights on superadjacent waters. It appears that the right to fish was originally regarded as deriving from ownership of the soil over which the water flowed.[99] Property rights attached to land, certainly in the feudal tradition, and interests in the water over land were ancillary to this. Indeed, the general position in respect of fisheries under the common law is to regard them, *prima facie*, as profits. There is a presumption that the owner of the soil (land) retains ownership of the fishery in the water above the soil. The treatment of fisheries as an incident of land ownership continues. Thus Halsbury's indicates that rights to swimming fish pass with the land and are 'an incident of the ownership of the soil'.[100] If this holds true, then the public right to fish may be limited by the extent to which ownership of land, or the seabed, was conceived. As noted below, this indicates that it was, at least originally, confined to a small margin of coastal waters. Another point to note is that evidence may be adduced of the grant of the right to the fishery separate from ownership of the soil.[101] Like other forms of property, it is not uncommon to find varying incidents of ownership vested in different persons, to varying degrees.

As a common law institution, the public right to fish developed piecemeal.[102] This makes it difficult to ascertain a single coherent or principled statement of the nature of the right. We can survey various cases and draw out aspects of the right. To start with, the right clearly permits fishing from boats, and this is distinct from the public right of navigation.[103] It is not limited to mere fishing, but includes necessary ancillary rights. An incident of the public right to fish is the right to use the sea shore for purposes essential to the enjoyment of the right of

[96] This is discussed in more detail by Moore and Moore, above note 11, chap. XIX.
[97] Above note 14, p. 46.
[98] *Ibid*.
[99] *Att. Gen* v. *Emerson* [1891] AC 649; *Hindson* v. *Ashby* [1895] 2 Ch. 1; *Neill* above note 39, at 152.
[100] 4th ed., vol. 18, para 616.
[101] Blackstone, above note 45, vol. II, p. 39.
[102] See Girvin, J. in *Adair* v. *National Trust*, above note 87, at 42.
[103] *Anderson*, above note 42, at 621.

fishery.[104] This is confirmed in *Anderson* v. *Alnwick District Council,* where it was held to extend to ancillary rights, such as the right to cross the foreshore in order to exercise the right.[105] The same case also confirmed that it included the right to collect bait from the foreshore as would be necessary to facilitate the public right of fishing.

A second observation is that regardless of judicial accounts of the nature and scope of the right, there are now in place many more modern restrictions on the right than were articulated during its early development. These are predominantly set out in legislation, for it remains within the authority of Parliament to legislate such matters as it sees fit. Of course, this may be subject to certain limitations on the authority of Parliament.[106] The public right to fish under the common law developed at a time when fisheries were not threatened by depletion, and there was less concern with protection of the environment. Such matters are not fully accounted for in the common law right. However, as Girvin J. noted in *Adair*, the common law right is so entrenched that it is for the legislature, not the courts, to regulate the common law right.[107] This has been done through various fisheries legislative provisions.[108] Such legislation is quite extensive, and it goes beyond the scope of this report to detail such legislative controls on sea fisheries. It may also be noted that Parliament may grant exclusive fisheries in tidal waters.[109] This much is now entrenched in statute, as per section 1 (3) of the Sea Fishery (Shellfish) Act 1967.

A final point to note here is that it is not perfectly clear whether the public right of fishing is a right or a liberty. A liberty (or privilege) is normally understood as meaning that a person is free to do something, whereas a right is usually conceived of as a claim against another person. In the case law, both terms are used to describe public fishing.[110] However, a preponderance of the cases indicates that the public right of fishing is more closely aligned with a liberty or privilege. Thus most cases have concerned the use of the public right as a defence against interference with the pre-existing liberty. There are no examples of the right being exercised in a way that requires other persons to do something positive to ensure the exercise of the right. As such the use of the term 'right' seems to be a more limited acknowledgement of the fact that it is a legally recognised entitlement.

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[104] Hall, above note 14, pp. 48-9.
[105] Above note 42, at 621.
[106] An interesting possibility would be the extent to which human rights issues may restrain the allocation of fisheries resources in the way in which the HRC dictated for Iceland Above note 5, and the accompanying text.
[107] Above note 87, at p. 43.
[108] See for example, Sea Fisheries Act 1843; Sea Fisheries Act 1868; Sea Fisheries Regulation Act 1888; Sea Fisheries Regulation Act 1966; Sea Fisheries Act 1968; Sea Fisheries (Wildlife Conservation) Act 1992.
[109] See *AG for British Columbia* v. *AG for Canada*, [1914] AC 153; *Queen* v. *Robertson* (1882) Can. Sup. Ct. 52.
[110] See for example, *Neill* v. *Duke of Devonshire,* above note 39, at 177-9.

Holders of the Public Right to Fish

Common law authorities indicate the right vests in the 'public' or in subjects of the crown. Thus the right can be exercised by individuals *qua* members of the public. There is nothing in principle limiting its exercise by individuals in a commercial context. In *Anderson*, the right to collect bait, which is ancillary to the right to fish, was limited to bait digging to facilitate fishing; but it was not permitted for commercial sale.[111] However, the limitation in this case only extends to ancillary rights, and not to the right to fish itself. Historically, the public right to fish appears to be limited to British nationals, although this does not appear to have been tested in court. This is linked to the political motivation surrounding the extension of exclusive control over fishing in coastal waters, rather than operating as some form of right enjoyed exclusively by nationals. There is no evidence to suggest that fishermen of any nationality could not fish in coastal waters so long as they were fishing from Britain, rather than fishing as distant-water fleets. Wisdom indicates that a foreign fishing vessel would be entitled to fish in British waters so long as it complies with any statutory permission to do so.[112] The most significant entitlement to fish is afforded to vessels of other Member States of the European Union under the common fisheries policy. In most cases, the right has been asserted by individuals and used to challenge claims of exclusive fisheries. In practice there would seem to be little point in limiting the right, as exercised for recreational purposes, to purely British nationals given the practical problem of controlling diffuse small-scale low-impact fishing.

For commercial fishing purposes, it is important to note that the common law has long since been overtaken by statutory regulation. Legislation does not generally remove the right, but determines how and when it can be exercised. This may limit the exercise of fishing rights in practice considerably. However, apart from instances of several rights being created in shell fisheries, such regulations have generally been limited to setting conditions for the exercise of fishing rights, such as the use of particular gear, or fishing seasons. It is crucial to understand that there is nothing that limits the right of the government to regulate fishing activities. Of course, questions remain as to whether regulations that effectively reduced fishing to exclusive private property would be permitted, and if so under what circumstances it would be deemed to be either politically or legally permissible.

The Nature of the Crown's Responsibilities.

[111] Above note 42, at 624.
[112] *Wisdom*, above note 16, p. 177.

It is clear that the Crown originally exercised ownership rights over coastal waters, and this extended to the fish, as profits thereof. Some writers have argued that the Crown's original position of ownership has developed into a form of trusteeship. Thus Farnham notes that the King would have had neither the time nor the inclination to exploit the fish for his own benefit, nor prevent his subjects fishing as they needed.[113] This and subsequent efforts to limit the power of the Crown resulted in the formulation of the idea that the Crown held the rights to fish in trust for the people.[114] However, there is no explicit basis for this 'doctrine of trust' and in the *Case of the Royal Fishery of the Banne*, the court explicitly refused to deal with a fishery at the King's pleasure in such a way.[115] Farnham accepted that the trust doctrine did not emerge until after the deposition of Charles I. However, quite how the Crown's right to deal freely with fisheries that it owned became limited is unclear. American law, in contrast to English law, developed the public trust doctrine to accommodate this tension between ownership of resources and public rights.[116] Such an approach is peculiar to US jurisprudence and did not evolve in the English common law. Viscount Haldane, in the *AG of British Columbia*, indicated that the Crown acted as '*parens patri*' in order to protect the interests of persons engaged in fisheries.[117] This form of protection then evolved into a legal right. All that appears to remain is a responsibility of the state, either by way of legislative control, or judicial protection, to ensure that the public right of fishing is not unreasonably fettered, or infringed by unfounded private claims to exclusive fishing in tidal waters.

Geographic Scope of the Public Right to Fish

The geographic scope of the public right to fish requires careful consideration because the spatial jurisdiction or sovereignty of the State has evolved since the earliest times when any public right was asserted. The general position is that the public have a 'liberty of fishing in the sea and the creeks or arms thereof'.[118] This includes fishing upon the foreshore between the high- and low-water mark, as well as the taking of shellfish,[119] so long as these have not been reduced to the possession of another by cultivation.[120] The extent of fishing on creeks or arms of the sea has been much discussed. In general the right is limited to the tidal part of a river.[121]

[113] Farnham, above note 44, para. 369.
[114] *Ibid.*, para 368.
[115] Davies 149. Admittedly this was a case concerning riparian fisheries.
[116] See S. Macinko and D.W. Bromley, 'Property and Fisheries for the Twenty-first Century: Seeking Coherence from Legal and Economic Doctrine' (2004) 28 *Vermont Law Review* 623.
[117] Above note 81, at p. 169.
[118] Hale, above note 21, p. 11 (reference to original page).
[119] *Bagott* v. *Orr*, above note 61. Also *Corporation of Truro v. Rowe*[1901] 2 KB 870, 878.
[120] *R.* v. *Downing* (1870) 23 LT 298.
[121] *R.* v. *Stimpson* (1863) 4 B & S 301.

The preferred extent of tidal waters is where the water flows and reflows.[122] This means that the precise limits of the tidal part of a river is a question of fact

Historically speaking, the seaward extent of the public right of fishing is not clearly stated in the common law. All that can be inferred is that it was linked to the extent of the Crown's ownership of the sea around the coast of England. This can be traced back to the writings of Thomas Digges (1589) [123] and was strongly maintained by English jurists.[124] A central role can be attributed to John Selden's highly influential text, *Mare Clausum* (1635), which sought to justify King Charles I's ownership of the British Seas.[125] Such ownership extended to the water and the seabed, and all things therein.[126] This posited ownership of fish in the Crown and there is evidence to support the Crown treating the sea and fisheries as property. The Crown's right of property in territorial waters was reaffirmed in the important cases of *Gammell v. Commissioners of Woods and Forests* (1859)[127] and the *Whitstable Fisheries case* (1864).[128] Unfortunately, the precise extent of the Crown's sovereignty or ownership is not made clear in these cases. Thus, in the *Whitstable Fisheries case*, this is stated to be the assumed distance of a cannon-shot from the shore.[129] There are indications that this might have been regarded as more extensive and subject only to the extent that the King could control. Indeed, in *Attorney-General for British Columbia*, Viscount Haldane considered it was clear that Lord Hale meant to include in the dominion of the Crown something much wider even than this (i.e., 3-mile limit).[130] However, there was little consideration of such matters in the common law prior to the nineteenth century. As indicated above, most disputes related to conflicts between public fishing rights and claims of excusive fisheries, and the latter were limited to coastal waters near to shore and to arms of the sea. Beyond coastal waters it was clear the freedom of the high seas prevailed and so there was no need to assert some form of public right to fish

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[122] *West Riding of Yorkshire Rivers Board* v. *Tadcaster RDC* (1907) 97 LT 436; *Ingram* v. *Percival* [1968] 3 All ER 657.
[123] T. Digges, above note 21, p. 185.
[124] See R. Callis, *Reading of the famous and learned Robert Callis, esqr, upon the Statute of Sewers* (1622), 4th ed., ed. W.J. Broderip (London, J. Butterworth and Son, 1824); Sir J. Boroughs, *The Sovereignty of the British Seas* (Edinburgh, W. Green and Son, 1633), reprinted London (1739) 43; Sir E. Coke, *The Fourth Part of the Institutes of the Lawes of England* (London, 1644) c 22, 142; J. Godolphin, *A View of the Admiral Jurisdiction* (London, Godbin, 1661); R. Zouche, *The Jurisdiction of the Admiralty of England Asserted* (London, F. Tyton and T. Dring, 1663), p. 20; R. Codrington, *His Majesty's Propriety, and Dominion on the Brittish Seas Asserted: together with a true account of the Neatherlanders insupportable insolencies* (London, T. Mabb, 1665), p.1; Lord Chief Justice Hale, *De Jure Maris*, extracted from Moore, above note 21, p. 367. Sir P. Meadows, *Observations Concerning the Dominion and Sovereignty of the Seas* (London, E. Jones, 1689), p. 42.
[125] J. Selden, *Mare Clausum* (1635), trans. M. Needham (London, 1652). See also See Sir John Boroughs, *The Sovereignty of the British Seas* (London, 1633).
[126] A position adopted by Hall, above note 94, pp. 2-7.
[127] (1859) 3 Macq. 174.
[128] *Gann* v. *The Free Fishers of Whitstable* (1865) XI HLC 191; (1865) 11 ER 1305.
[129] Above note 11, p. 1316.
[130] Above note 81, at p. 169.

derived from Crown ownership of the seas. It may also be noted that international assertions to wider maritime dominion had lapsed before many fisheries cases came before the courts, and there was little concern with the extent of the Crown's rights of ownership in the seas until the nineteenth century.

R. v. *Keyn* (1876) is taken to be authority that the common law did not extend beyond the low-water mark.[131] However, this case concerned the assertion of criminal jurisdiction, and it is doubtful that it in any way limited other common law doctrines, particularly the public right to fish. Since this time, the nature of the Crown's rights in the territorial sea ceased to be couched in terms of ownership, but rather in terms of sovereignty, as this became the accepted juridical nature of the territorial sea. This does not, however, restrict the Crown's assumed proprietary interests in the waters or seabed of the territorial sea under the common law.[132]

It is generally accepted that the domestic limits of the territorial sea must accord with international law. As is well known by students of the history of the law of the sea, the breadth of the territorial sea was long a matter of controversy and variation in practice between States. Until the mid-18th century the existence and limit of territorial waters was heavily debated by scholars. In 1744, Bynkershoek formulated the cannon-shot rule, which asserted that exclusive control over coastal waters extended as far as could be defended by the shot of a cannon.[133] At the same time Scandinavian States asserted exclusive control over a belt of waters extending to approximately 1 league. It was not until the late 18th century that these discrete limits coalesced in a more uniform limit of 3 nm. This limit was generally adhered to by maritime powers, including the United Kingdom, but never formally agreed or accepted by all States as a general rule of international law. This position continued until the LOSC set the limit of the territorial sea at 12 nm.[134]

As a result of the uncertainty in the common law, the seaward limit of the public right to fish has since been set by statute. The Territorial Waters Jurisdiction Act 1887 assumed a seaward limit of 3 nm. However, the Act did not actually delimit the territorial sea at 3 nm; section 7 merely refers to waters 'deemed by international law to be within the territorial sovereignty of Her Majesty'. To the extent that international law could be said to limit the territorial sea to 3 nm, then this might have fixed the limits of the territorial sea.[135] This was not a particularly clear example of legislative drafting. Despite this, the actual limit was not adjusted until 1987, when the territorial sea was extended to 12 nm for waters around the

[131] (1876) 2 Ex. D. 63.
[132] See Barnes, above note 1, pp.190-8.
[133] C. van Bynkershoek, *De Domino Maris* (1744), tran RVD Magoffin (London, Oxford University Press, 1923), chap. 2.
[134] Article 3 LOSC.
[135] The point is discussed by Fulton, above note 25, pp. 591-3.

UK.[136] Even now some anomalies remain. For example, the 1987 Act provides that unless provided for by an Order in Council, this does not apply to the Channel Islands. Unlike Jersey, which was subject to an Order extending its territorial sea, the territorial sea around Guernsey remains limited, as a matter of domestic law, to 3 nm. This has since given rise to disputes concerning the state's authority to regulate fisheries within what are normally considered to be territorial waters.[137]

Historically, there has been an important distinction between territorial waters and the high seas. Within territorial waters, foreign nationals enjoy no rights to fish. Thus the public right of fishing is enjoyed by nationals within territorial waters, subject to any limits resulting from the grant of exclusive fisheries. On the high seas, nationals of all States enjoy the right to fish on the high seas. The right is granted to States and may be exercised by their nationals, subject to limits on the State's rights.[138] Such limits include treaty obligations, general duties to conserve and manage living resources, and to cooperate with regard to conservation and management. There is also a duty to have due regard to other users of the high seas. The high seas are generally defined as those areas beyond the exclusive jurisdiction of the coastal State. Initially this pertained to areas beyond the territorial sea, however far this stretched. However, under the LOSC, the high seas are now limited to waters beyond 200 nm since States may claim an exclusive economic zone (EEZ).[139] Within this zone States enjoy sovereign rights for the purpose of exploring and exploiting living resources. This allows States to limit fishing opportunities to their nationals within the 200-nm EEZ.

It has not been confirmed whether the seaward extent of the public right to fish under the common law has kept pace with the limits of the territorial sea under international law or indeed the EEZ or equivalent fisheries zone. There is some support for the view that the public right to fish is co-extensive with the territorial sea. The Australian High Court in *Commonwealth* v. *Yarmirr* accepted that the common law followed Australia's extended jurisdiction from 3 to 12 nm.[140] From this it might be presumed that if the public right to fish is derived from the Crown's ownership of the soil, then the right to fish will be coextensive with the geographic extent of the Crown's ownership rights. Until the mid-19th century these were not restricted as to their seaward extent. For a period from 1887 until 1987, the territorial sea was *prima facie* limited to 3 nm, and it would appear reasonable to assume that the public right to fish was also so limited. Beyond 3 nm, there remained the freedom to fish on the high seas, which rendered the need to argue a public right moot. It seems inconceivable that a vacuum in fishing

[136] Section 1(1)(a) Territorial Sea Act 1987, c. 49.
[137] *Jersey Fishermen's Association and others* v. *States of Jersey* [2007] UKPC 30.
[138] Article 116, LOSC.
[139] Articles 56-7 LOSC.
[140] [2001] HCA 56, at paras. 74-5.

opportunities was intended to result from the extension of the territorial sea to 12 nm without any commensurate extension in public fishing rights to the same extent. For this reason it seems sensible to hold that since 1987, the public right to fish has at least been extended to 12 nm, co-extensive with the UK territorial sea. In principle, there seems no reason why this entitlement does not also extend to waters forming part of any exclusive fisheries zone.

Limitations on the Right

The public right of fishing is not an absolute right. Thus it may be subject to regulation and limitation by the State. As a matter of principle this is quite reasonable. Any liberty if used to the absolute degree will be destructive of, or harmful to, the liberty of other persons. More specifically, the unrestricted use of a public right to fish may result in the destruction of the fishery.[141] Capturing this view, the court stated in *Lord Leconfield and others* v. *Lord Lonsdale* that '[i]n the sea and tidal parts of rivers the public have the right of catching all the fish they can by all means which are not inconsistent with the equal rights of each other'.[142] Although this was an *obiter* remark, it is consistent with the nature of an entitlement held by the public at large. The common law might be viewed as placing some specific limits on fishing, such as limiting the quantity of fish that may be appropriated, gear to be used and times of fishing. For example in *Warren* v. *Matthews*, the court refers to 'lawful nets' as a constraint on fishing. However, the fact is that any general requirement of reasonable use, or any specific form of use limitation under the common law, will have been long since surpassed by statutory controls. Writing at the turn of the twentieth century, Moore and Moore noted that the public right to fish must be exercised reasonably, and with respect to any applicable statutes.[143] A final point to note here is that although such rules do not destroy the public right to fish, they do articulate how the right is to be exercised.

Establishing a Claim to a Private Fishery

Given that one of the most significant limitations on the public right of fishing is the existence of a private or several fishery, it is helpful to consider how this can be established under the common law, and when this will be deemed to exclude the public right. A line of authorities indicates that a person seeking to establish the existence of an exclusive fishing right has the burden of proof. In *Lord Fitzwalter's case*,[144] Hale CJ held that a person claiming a free fishery,

[141] Farnham, above note 44, p. 1393, para 381.
[142] (1870) L.R. 5 C.P. 657, at 665.
[143] Moore and Moore, above note 11, p. 96.
[144] (1673) 1 Mod. 105; (1673) 86 ER 766.

several fishery, or commons of fishery, must provide evidence that he has the claimed right of fishing. Thus the burden is on the party showing the public right of fishery has been removed. This position is asserted in *Carter* v. *Murcot*. 'If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right, though the presumption is against him, unless he can prove such a prescriptive right.' This would require them to show on the balance of probabilities that the right exists. As noted above, this can be done by establishing evidence of title going back to before 1215. A second option is to establish, as per *Malcomson*, evidence of long-standing use. This is important, as the courts have been prepared to accept such evidence to establish an exclusive fishery. In *Loose* v. *Castleton*, the Court of Appeal held that once evidence was adduced of a long-standing usage, the burden then falls upon the party claiming a public right to show that the origin of the fishery is in fact modern, i.e., dating from 1189.[145]

Mere evidence of title, 'a paper title', is not sufficient to establish a private right of fishing. The common law also requires 'possession', or rather evidence of acts of ownership.[146] The quality of such acts depends on the circumstances. For example, proof of ownership of a fishing weir, or other means of taking fish, may be evidence of ownership of the entire fishery.[147] Acts such as the fixing of stakes, building of piers or boathouses, taking of gravel, and other cultivating activities have been accepted as evidence of ownership of the soil, and hence the right of an exclusive fishery.[148] Of the forms of evidence, Moore and Moore indicate that evidence of netting is most important, as this was the most common form of taking fish.[149] Such acts have generally been limited to tidal waters immediately adjacent to the coast. This is because it is simply impractical to manifest long-standing acts of ownership at a distance from the shore. Absent any evidence of title and acts of ownership, the public right of fishing must be deemed to exist.

The Effect of Establishing a Private Right

Once title to fish in tidal waters has been lawfully and conclusively established, then no fishing by the public can displace the right.[150] Interruption of a several fishery does not destroy the

[145] (1981) 41 P. & C.R. 19, per 30-1 Bridge, L.J. relying upon *Malcomson* v *O'Dea.*
[146] See *Neill* v. *Duke of Devonshire*, above note 39. Also, *Blount* v. *Layard* [1891] 2 Ch. 681.
[147] See: *Gabbet* v. *Clancy* (1845) 8 Ir. L. R. 299; *Malcomson* above note 13; *Neill* above note 39; *Att.-Gen.* v. *Emerson* [1891] AC 648; *Lord Advocate* v. *Lord Lovat* (1879) 5 AC 273; *Powell* v. *Heffernan* (1881) 8 L.R. Ir. 132.
[148] See *Partheriche* v. *Mason* (1774) 2 Chitty 258; *R.* v. *Aresford* (1786) 1 TR 358.
[149] Above note 11, p. 148.
[150] *Neill* v. *Duke of Devonshire,* above note 39.

right vested in the holder.[151] Normally, long evidence of use is allowed to support a claim that a right by prescription exists. However, evidence of use does not displace a prescriptive right that is also supported by written title and evidence of possession.[152] Thus Moore and Moore conclude that 'once a several fishery always a several fishery.[153] This is based upon the idea that any fishing in an area subject to a several fishery is either by express or implied permission from the owner. Once a public right has been excluded, then it cannot be regained. Of course, this ignores the possibility of the Crown reacquiring the several fishery and then reverting it back to a general public use. Evidence of such an acquisition and reversion would need to be established and no examples of this being done have been found. One exception to this may be in the case where title to a several fishery has not been conclusively established, in which case the long-standing evidence of a public right of fishing may be used to dispute the existence of any such title.[154] One should also distinguish a general public right of fishing from a right enjoyed by a more limited class of persons. Such a right might be confused with a general public right to fish. For example, inhabitants of towns or parishes have asserted rights to take fish in fisheries owned by public bodies. Such rights to take fish have been difficult to establish, but in the case of *Goodman* v. *The Mayor of Saltash*, the House of Lords recognised that although the corporation held a several fishery, this was not an absolute or unqualified title for their sole benefit, but one held in trust for the benefit of inhabitants of the borough as shown by their usage.[155] Thus inhabitants of the borough might fish in the area, but not the wider public.

Concluding Remarks

A public right to fish in British waters exists for British vessels. This right emerged under the common law and precedes much public regulation of fisheries. As such, it might be viewed as supporting a presumption that fishing is permitted unless specifically restricted. Its origins in law can be traced back with some certainty to 1610 and the *River Bann fishery case*, and it has been considered in numerous cases since, most recently being confirmed in *Isle of Anglesey County Council* v. *Welsh Ministers and others* (2009). In 1863, in the case of *Malcomson* v. *O'Dea*, the House of Lords confirmed the right to have existed since the Magna Carta (1215). Although this seems to be a legal fiction, it has since been generally accepted by judges and commentators.

[151] *Ibid*., 170.
[152] *Ibid*., 156.
[153] Moore and Moore, above note 11, p. 152.
[154] *Ibid*., p. 153.
[155] (1882) 5 CPD 431; 7 App. Cas. 633.

The public right to fish exists in coastal waters extending to 12 nm and probably as far as the outer limits of an exclusive fisheries zone. It includes tidal waters and arms of the sea. It exists unless it can be established that a private fishery was granted prior to the Magna Carta or evidence of long-standing use since then can be adduced. The right is held by individuals as members of the public, although the category of persons is untested. It extends to all fishing types and techniques in the territorial sea. It includes fishing from boats, and allows for certain ancillary rights such as bait digging and permits access to the foreshore to facilitate fishing. It may be restricted by legislation. This has frequently been done under the various Sea Fisheries Acts, and associated delegated legislation. It is also subject to a "reasonable use" requirement under the common law. There is a general responsibility on the State not to unreasonably fetter the right.

If the general position is that a general right to fish exists, subject to any licensing or regulatory limitation deemed necessary to ensure the proper conservation and management of the fisheries, then this raises at least one question: could such a public right be used to challenge fisheries legislation in general? The lack of such challenges in the past suggests that this is unlikely. However, the absence of challenge might simply be because fisheries legislation has not so far fundamentally challenged the existence of a public right to fish. Also, it is probably undesirable that a general liberty to fish could be used to challenge statutory rules that properly seek to limit fishing effort in order to ensure sustainable fishing. That said, at the time of writing, there is much interest in the use of rights-based fishing mechanisms, and these present a different order of change to fishing entitlements. These can significantly alter the nature of fisheries because they can result in permanent and exclusive rights being vested in a limited category of persons. As the experience of Iceland shows, unless such measures are strongly justified in terms of conservation and management needs, then they are vulnerable to challenge by fishing interests that have been disenfranchised. If nothing else, this cautions a degree of sensitivity in the design of fisheries regimes, especially those that may limit public entitlements.

Revisiting the Public Right to Fish in British Waters

Introduction

Many fisheries around the world have been subject to significant reform or are undergoing major review. Such reform will seriously impact upon existing patterns of entitlement and regulation. This in turn is likely to generate resistance to change and, in some cases, legal challenge. At a time when the use of rights based entitlements to regulate fisheries are receiving serious attention, there is growing interest in seeking out means of challenging what is perceived to be the privatisation of a public good.[1] The present paper reflects upon some historical aspects of fishing rights under the common law and considers how this may limit or influence future changes in the regulation of fisheries. In particular, it is concerned with the so-called public right to fish within the common law. In broad terms the public right to fish right describes a form of entitlement to fish that cannot be removed by the Crown. It is thus suggestive of certain limits on the regulatory authority of the government to use certain instruments such as private property rights to regulate marine fisheries. More generally it might seem to embody the idea that the resource is reserved for use in the wider public good or is reserved to ensure that certain public needs can be met.

This may seem to be a rather restricted field of enquiry, but it should be remembered that the English common law underpins many legal systems around the world. Moreover, the specific notion of public right to fish has manifested itself repeatedly in institutions within common law legal systems, such as the public trust doctrine in US jurisprudence and fisheries law in Australia. This suggest that an understanding of the public right to fishing under the common law is not or mere limited concern to students of English legal history. Moreover, it is also clear that in any legal system, the baseline legal status of fishing rights may impact upon subsequent legal developments. Take for example, the recent resort to human rights law, as illustrated by the recent Human Rights Committee ruling against Iceland. All exploitable marine fish stocks to the limit of Iceland's 200nm exclusive fishing zone are the common property of the Icelandic nation.[2] This means that fisheries have an important public function. Since 1975, many fisheries have been subject to rights-based management as individual quotas were

[1] On the development of property rights generally, see A. Scott, *The Evolution of Property Rights* (Oxford, Oxford University Press, 2008). On some of the limits of property rights see R. Barnes, *Property Rights and Natural Resources* (Oxford, Hart Publishing, 2009).
[2] Article 1 of the Fisheries Management Act 2006.

introduced into the herring fishery.[3] This shift in regulatory focus has not been without its difficulties and there have been numerous challenges to both the system and particular allocation of quotas.[4] This came to international prominence in 2007, when the United Nations Human Rights Committee ruled on the legality of aspects of the Iceland's fisheries management regime.[5] In 2001 two fishermen, Erlingur Sveinn Haraldsson and Orn Snaevar Sveinsson, challenged the quota system after they purchased a boat but were unable to obtain a fishing quota. Although they could lease a quota, this was at such a high rate as to make fishing wholly unprofitable. They decided to fish without a quota and challenge the ITQ system in the Icelandic courts. After the Icelandic Supreme Court ruled that the quota system was constitutional, they filed a claim with the United Nations Human Rights Committee (HRC). Much of the issue turned on whether the introduction of privately held quotas was in the public good. For example, Iceland argued and the authors of the complaint accepted that measures to limit over fishing were necessary, and that the public interest required restrictions on the freedom of individuals to engage in commercial fishing.[6] However, it was also asserted that such restrictions should be of a general nature, reasonable and that all persons meeting such requirement should have an equal chance of access to quotas. Although not fully reasoned, the HRC ruled that 'the property entitlement privilege accorded permanently to the original quota owners, to the detriment of the authors, is not based on reasonable grounds.' [7] Furthermore, Iceland is 'under an obligation to provide the authors with an effective remedy, including adequate compensation and review of its fisheries management system'. [8] It is not clear how far reaching the decision of the HRC will be, but it seems that some reform of the fisheries management regime will be required to ensure Iceland's compliance with general human rights obligations. The case shows how much legal context matters, and also how the previously public character of a resource imposed certain limits on the subsequent regulatory shape of entitlements.

The paper is divided into four sections. In the first part, some brief observations are made on the importance of historical ideas in the process of legal change. In the second part, the treatment of the legal nature of fishing rights by leading commentators is briefly considered. This is then examined in light of its treatment in the common law. In part four, the nature and extent of this right as it currently operates are examined. Finally, some brief observations are offered on its potential role as a regulatory tool. However, these are points that will require

[3] The Fisheries Management Act 1990 placed all commercial fisheries under a complete system of ITQs (Fisheries Management Act, No. 38, 15th May 1990). This Act was re-issued as the Act on Fisheries Management 2006, which is a consolidated version of fisheries legislation since 1990 (Act 116 of 10 August 2006).
[4] Barnes, above note 1, pp. 354-5.
[5] *Haraldsson and Sveinsson v. Iceland of 24 October 2007*, Communication *No. 1306/2004*
[6] Ibid, para 6.6.
[7] Ibid, para 10.
[8] Ibid, para 12.

more careful consideration and merit more detailed treatment that is possible in the present paper.

Some Reflections on the Role of Historical Rights

The history of law plays a vital role in the process of law reform. Of course change may be motivated by multiple social, economic and economic reasons, but when it occurs in law, it must also be evaluated in light of what is legally permissible and desirable. So when we seek to reform the law, we measure the change against the yardstick of what the law allows and what will be deemed to be legally acceptable. This process of weighing up the possibility and desirability of legal change is an incredibly difficult but necessary process. Law is the product of many tensions. For example, the law of the sea is in part a result of the tension between *mare liberum* and *mare clausum*, the tensions between coastal state and flag state authority, the tensions between inclusive and exclusive claims to oceans use, the tensions between certainty and flexibility. There are many other complex tensions, such as those between commercial and environmental concerns, and between development and conservation. The law of the sea, as a process, seeks to mediate between these tensions and to accommodate as far as possible the range and quality of interests possessed by the principal actors and subjects involved in oceans use. Law is a dynamic process that evolves to meet new challenges presented by changing knowledge and circumstance. This process is massively complex, having evolved over hundreds of years to meet innumerable circumstances. For the student of the law of the sea, one small window into this complexity is to recall the view of the United Nations Convention on the Law of the Sea (LOSC)[9] as a package deal, that is to say the product of legal and political negotiations that has resulted in a careful balance of the interests between States and groups of States in respect of the Conventions substantive rules.[10] Of course, the LOSC is merely one, albeit significant, part of the law of the sea, which in turn is but one part of general international law, which is in turn one dimension of law that continues to operate at regional and domestic levels. Legal change may be politically, or socially, or economically, or scientifically driven, but it must still occur through legal channels. As such, the case for or against change will be couched in legal terms, at least in part. The way in which law can produce complex balances of rights and responsibilities is well illustrated, even over a short time, by the case of *Haraldsson and Sveinsson v. Iceland* noted above.

[9] United Nations Convention on the Law of the Sea 1982. 1833 UNTS 3; (1982) 21 ILM 1261.
[10] See H. Caminos and M. Molitor, 'Progressive Development of International Law and the Package Deal' (1985) 79 *AJIL* 871.

Just as commentators warn against trying to unpick the LOSC, care must be taken in trying to adjust any legal relationship for each legal relationship forms part of a complex array of interests that are affected by change. For example, if a fishing practice is shown to be unsustainable, then it may be prohibited or qualified. This in turn may result in fishing effort being channelled into other areas or towards other species. It may generate political and economic pressure to compensate fishermen for lost income. It may increase pressure on welfare mechanisms. This is to say nothing of the complex impacts that may occur within the ecosystem itself. So far this might seem to read against a caution against change. It is a warning certainly, but perhaps only to heed to risks of careless disregard of legal context. The following review of the public right to fish in the common law explores one strand of legal development and indicates the complexity that forms part of the legal

As might be expected when we begin to explore the Byzantine development of the common law, the public right to fish is not a straightforward matter. Indeed, the leading commentary on the development of fisheries law in Great Britain, Moore and Moore's *The History and Law of Fisheries* (1903) begins by nothing that there is considerable confusion in the law.[11] Misconceptions about facts have arisen and undue weight has been attributed to the dicta of ancient writers. This has resulted in the 'enunciation of principles very often inconsistent with the true facts as to the existence, nature and attribute of fisheries'.[12] This is, as shown below, particularly the case in respect of the public right to fish. Furthermore, the concepts used to describe public and private fishing rights are not always used consistently.[13] This makes it difficult to plot the precise development and content of the public right to fish. Unlike international fisheries, there have been few detailed considerations of fishing rights in domestic law. In 1875, Hall examined some fisheries law as part of his broader treatise on rights of the sea shore.[14] In 1904, the American writer Henry P. Farnham, provided a quite detailed account of fisheries.[15] The most recent edition of Wisdom's Law of Watercourses devotes some attention to the nature and extent of the right, although this is necessarily succinct as it is merely one aspect of a more general examination of the law relating to

[11] S.A. Moore and H.S Moore, *The History and Law of Fisheries* (London, Stevens and Haynes, 1903), pp. v-vii. Hereinafter, 'Moore and Moore'.
[12] Ibid, p. vi.
[13] Ibid, p. xxxvii; Also, *Malcomson* v. *O'Dea* (1862) 10 HL 593, per Wiles, J.
[14] R.G. Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea-Shores of the Realm* 2nd edn. (William Waler, London, 1875).
[15] Henry P. Farnham, *The Law of Waters and Water Rights* (Rochester, The Lawyers Cooperative Publishing Company, 1904).

watercourses.[16] Appleby has been keen to raise awareness of the right, but is concerned that it can be used to sustain a culture of overfishing.[17]

Despite some complexity or ambiguity in the nature and extent of the public right to fish, it is possible to construct some general delineations of the right in the common law and the key academic commentaries on fishing rights. By providing an account of the public right to fish we are able to gauge the extent to which potential regulatory change, such as the introduction of stronger rights based entitlement in fisheries, can be accommodated within the common law.

A Brief Survey of Commentaries on Marine Fisheries in the Common Law

Prior to Moore and Moore, there was no systematic doctrinal analysis of the actual origins and development of the public right to fish. The earliest legal authorities tended to ignore marine fisheries. Thus Johnston notes that the Romans had little interest in maritime law or fisheries, other than as ancillary to assertions of military authority.[18] Roman law merely regarded fish as *ferae naturae* which were free to capture by all and this exerted a strong influence on both civil and common law doctrines. Under feudal law, authority was derived from ownership of land and this could not be applied to the sea.[19] This perpetuated a de minimis approach to fisheries regulation. Of course, feudal law did admit private grants of fishery in rivers and limited coastal waters, and as the monarchs sought to bestow privileges on favoured subjects, such were generally quite limited in marine areas. This approach was largely consistent with predominant natural law doctrines which favoured the equal rights of all men in certain commons. When the matter was considered in legal writing, it was briefly done, and usually as part of a wider treatise on maritime law or, indeed, the common law in general. Henry de Bracton, writing his treatise on the Laws and Customs of England in the 13th century, merely asserted that the seas are common to all as of natural right, and this extends to the right of fishing in ports and rivers.[20] This seems to be a simple assertion drawn directly from Roman law without other authority. In 1569, Thomas Digges asserted crown's right of property in the sea and seabed,

[16] W. Howarth, *Wisdom's Law of Watercourses* 5th ed. (Shaw & Sons, Crayford, 1992), esp. 176-82.
[17] T. Appleby, 'The public right to fish. Is it fit for purpose?' (2005) 16 *Water Law* 201. This generated some response. See P. Scott, 'Another view of the public right to fish – and the question of regulation or ownership' (2008) 19 *Water Law* 37; T. Appleby, 'Response to "Another view of the public right to fish – and the question of regulation or ownership"' (2008) 19 *Water Law* 41.
[18] D.M. Johnston, *The International Law of Fisheries* (New Haven, Yale University Press, 1965), pp. 158-9
[19] See P.T. Fenn, *The Origin of the Right of Fishery in Territorial Waters* (Cambridge, Harvard University Press, 1926), pp. 66-7.
[20] *De Legibus et Consuetudinibus* (trans. T. Twist)(London, Longman and Co.), p.57.

observing that Kings have suffered fishermen to use the seas under the *jure gentium*.[21] It is unclear how far this approach became accepted. For example, it was rejected by Plowden, a leading lawyer, in *Sir John Constable's case*, but accepted by Sir John Dee.[22]

Taking a broader perspective on maritime authority in general, it may be noted that prior to the seventeenth century it was not at all clear that States had the right or desire to claim any authority over marine spaces and so guarantee any rights of fishing for their subjects. Certainly, as is noted below, there is evidence of claims to public and private fishing rights dating back to the early 17th century, but there was little coherence to such claims.[23] Later decisions seemed assume a degree of coherence in the law or attempt to make retrospectively impose a sense of order on the pre-existing uncertainty. It was not until the 16th century that States began to assert limited jurisdiction over coastal waters, thereby creating the conditions for more extensive domestic fishing rights. And it was not until the 17th century that writers, such as Grotius and Selden, devoted any time to considering the regulation of coastal spaces and presenting a systematic account of rights and duties therein, and of their philosophical or legal basis. From this point on more coherent account of fishing rights, which reconciled domestic practices with the limits of States authority were possible. In short, the vast scale of the oceans, the general absence of conflicts between users which might generate political motive for regulation, the practical difficulties of asserting authority and the absences of clear juridical basis for exclusive claims combined to produce a general liberty to use the seas. As Judge Alvarez stated in his Individual Opinion in the *Anglo-Norwegian Fisheries case*, '[f]or centuries, because of the vastness of the sea and the limited relationships between States the use of the sea was subject to no rules; every State could do as it pleased'.[24] There were limited exceptions to this, as noted below, but these tended to be ad hoc and highly localised situations.

Matters began to change in the early 17th century. The colonial ambitions of European powers generated considerable interest in the legal regime of the seas, and the legitimacy of claims to inclusive or exclusive authority. Grotius, acting on behalf of the Dutch East Indies Company sought to defend the freedom of the Dutch to navigate the oceans and advanced his theory of mare liberum against the exclusive maritime dominion asserted by the Spain and Portugal. The British soon entered this debate, initially as a means of defending the interests of domestic fishermen against the more effective Dutch fishing fleet that was thriving in the North

[21] T. Digges, *Arguments proving the Queens Maties Propertye in the Sea Landes and Salt Shores Thereof* (1569), reprinted in S.A. Moore, *A History of the Foreshore and the law relating thereto. With a hitherto unpublished treatise by Lord Hale, Lord Hale's "De Jure Maris," and Hall's Essay on the Rights of the Crown in the Sea-shore*, 3rd ed. (1888), p. 185.
[22] Sir John Dee, *General and Rare memorials pertaining to the Perfect Arte of Navigation* (1577).
[23] Moore and Moore indicate the existence of tidal fisheries as far back as the Domesday booking the 11th century. However, this appears to be simply evidence of a practice. The actual legal basis of such fisheries is not at all clear. See above note 11, pp. 1-5 and 6.
[24] *Anglo-Norwegian Fisheries case* [1951] ICJ Rep. 116, 146.

Sea, and then using fisheries as the foundation of its maritime wealth and power.[25] A strong domestic fishery could supply the skill and experience necessary for the development of a powerful navy. Among the first jurists to assert a the coastal States claim to exclusive authority over fisheries was the Scots lawyer William Welwood in 1613, who argued that overfishing demanded some means of reserving coastal fisheries for the coastal State.[26] As he wrote:

> 'the primitive and exclusive right of the inhabitants of a country to the fisheries along their coasts; one of the principle reasons for which this part of the sea must belong to the littoral State being the risk that these fisheries may be exhausted as a result of the free use of them by everybody.'[27]

His argument was intended to justify British claims against other States, rather than designate fisheries either public or private. Of course, a claim to exclusive fisheries against other States could only have persuasive force if the right was vested in the authority of the King rather than the ordinary people. Claims of individuals could not be made against foreign powers, but rights of the King. The King was the external representation of the State. The important point to note is that the strength of any rights or liberty of private persons for fish was contingent upon the Crowns ability to defend such claims externally. Thus fishing rights were intimately related to the assertion of Crown authority in their formative stages.

The 17th century witnessed a marked outpouring of legal opinions devoted to defending the claims to crown authority over coastal waters. In a series of lectures delivered at Grey's Inn, Serjeant Callis argued for a *Mare Anglicum* on the basis of sovereignty, jurisdiction, property and possession.[28] In 1633, Sir John Burroughs wrote *The Sovereignty of the British Seas* which forcefully argued for English dominion over the seas, drawing upon an array of documents. However, Fulton notes that the treatise was more a list of claims and devoid of reason based upon law.[29] Moreover it was not published until 1651 and so was limited in its initial influence. John Selden assumed the mantle and presented the most compelling defence of English authority over coastal waters in his treatise *Mare Liberum* (1635).[30] Unlike Welwood, Selden was more concerned with maritime authority in general, rather than the limited matter of fisheries. That said the need to secure exclusive State authority over fisheries was necessary for Selden. The sea, 'by reason of other men's Fishing, Navigation and Commerce, becomes the wors for him that owns it and others that enjoie it in his rights; so that the less profit ariseth, then might otherwise bee

[25] See T.W. Fulton, *The Sovereignty of the Sea* (London, Blackwood, 1911), chapters IV and V.
[26] See M.J van Ittersum, '*Mare Liberum* Versus the Propriety of the Seas?' (2006) *Edinburgh Law Review* 239.
[27] W. Welwood, *An Abridgment of All Sea Laws* (1613), chapter 26.
[28] R. Callis, *Reading of the famous and learned Robert Callis, esqr., upon the Statute of Sewers* (1622) 23 Hen. VIII., c. 5, 16. (Fourth ed. by W.J. Broderip, 1824).
[29] Fulton, above note 25, p. 366.
[30] J. Selden, *Mare Clausum* (1635), translation by M. Needham (London, 1652).

received therby.'[31] For a time, the book assumed both legal and political significance because its publication coincided with Charles I assertions of maritime authority against European nations. Its subsequent legal authority was strengthened through the approval or later writers such as Coke,[32] Godolphin,[33] Zouche,[34] Codrington,[35] Meadows,[36] and Hale, who is discussed in more detail below.

Although freedom of the seas became the dominant principle of maritime relations between States, it was yet conceded that a limited band of coastal waters was subject to the exclusive authority of the coastal States.[37] This allowed for the development of more sophisticated domestic law rules pertaining to coastal fisheries. In the common law the most important and detailed treatment of the subject was provided by Lord Hale, who wrote *De Jure Maris* circa 1670.[38] As the most eminent judge of his generation, unsurprisingly, Hale's legal opinions became highly authoritative in the common law courts and reference to *De Jure Maris* or Hale are a common feature of many 18th and 19th century decisions concerning fisheries in tidal waters.[39] Hale states the origin of the public right of fishing in tidal waters to be in the King's ownership of the soil of the sea.[40] He goes on to note that '... the common people of England have a regular liberty of fishing in the sea or creeks and arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained or it, unless in such places, or creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty.'[41] This much differs little from the above commentaries, but stresses that the right of the King generates a common right of fishing. This position is then little considered by writers, or, indeed, challenged, until the 20th century.

Origin of the Public Right to Fish

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[31] Ibid, bk 1, p. 141.
[32] Although Coke's Fourth Institute was published posthumously, it does however give a more considered view of the nature of the Crown's rights of property in the English seas. Sir E. Coke, *The Fourth Part of the Institutes of the Lawes of England* (1644), c. 22, 142.
[33] J. Godolphin, *A View of the Admiral Jurisdiction* (1661).
[34] R. Zouche, *The Jurisdiction of the Admiralty of England Asserted* (1663), p. 20.
[35] R. Codrington, *His Majesty's Propriety, and Dominion on the Brittish Seas Asserted: together with a true account of the Neatherlanders insupportable insolencies* (1665), p. 1.
[36] Sir P. Meadows, *Observations Concerning the Dominion and Sovereignty of the Seas* (1689), p. 42.
[37] Barnes, above note, 1, pp. 183ff
[38] Hale's treatise was actually part of a larger tract in three parts: '*Pars prima. De Jure Maris et Branchiorum eiusdem. Pars Secunda. De Portibus Maris. Pars tertia. Concerning the customs of goods imported and exported*'. *De Jure Maris* is reprinted in Moore, above note 21.
[39] See for example *Bagott* v. *Orr* (1801) 2 B. & S. 472. Lord Blackburn quotes extensively from Hale in *Neill* v *Duke of Devonshire* (1882) 8 App. Cas. 135; *Reece* v *Miller and others*, (1882) 8 QBD 626, per Grove, J.; *Henry Blake and Johyn Goodman, the Younger* v. *The Mayor and free Burgesses of the Borough of Saltash*, (1882) 7 App. Cas. 633, per L. Blackburn (651); *R* v *Musson*, 8 E. & B. 900, 27 L. J. (M.C.) 100.
[40] *De Jure Maris*, p. 378.
[41] *Ibid.* p. 377.

As the above review of legal commentaries reveals, the position developed that both the public right of fishing and any private exception to this were rooted in the Crown's ownership of the sea. Given such assertions of a right of ownership it is important to see the extent to which this was manifest in domestic law. The point of origin of this right in law is not entirely clear, but it is often mistakenly attributed to the Magna Carta. For example, in the recent High Court decision in *Anderson* v. *Alnwick District Council* (1993) Evans LJ stated that '[b]efore Magna Carta, the Crown made grants of 'several fisheries' (private fishing rights) in areas of tidal waters, but this was regarded as an abuse which Magna Carta ended in 1215.' [42] However, the Magna Carta says nothing directly about private or public rights in marine fisheries. And it is certainly clear that it makes no such prohibition on private rights. The only relevant provisions of the charter are Chapter 23 and Chapter 16 (of the third revision). Chapter 23, reads: 'Omnes kidelli decetero deponantur penitus per Tamisiam et Medeweiam et per totam Angliam, nisi per costeram maris.' This translates as 'All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.' The provision was apparently designed to protect free navigation on rivers, hence the requirement to remove obstacles to navigation on rivers, but not the sea-coast, where weirs would not necessarily impede navigation.[43] Farnham, a leading US scholar who researched the development of waters rights extensively under the common law, notes that the Charter simply cannot sustain the interpretation placed upon it.[44] The other provision relied upon as limiting the Crown's right to grant a several fishery is attributed to Blackstone, who stated that exclusive rights of fishing in "public" rivers could not "at present be granted, by the express provision of *magna carta,* c. 16'.[45] This assertion is not supported by the actual text of chapter 16, which is translates as: 'No river banks shall be guarded (placed in defence – defandantur) from henceforth, but such as were in defence in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time.' It is doubtful that this can be read as precluding the grant of several fisheries, and Farnham attributes the error to Coke, who incorrectly read the provision as affecting the grant of private fisheries.[46]

If the attribution of the public right of fishing to the Magna Carta is a legal fiction, then how far back can the right be traced as a matter of law. Most authorities and judges attribute the rule to the House of Lords in the seminal case of *William Malcomson* v. *John O'Dea and Others* (1863).[47] As noted below, a number of earlier cases did uphold the right, but as decisions of lower courts they are not regarded as important. *Malcomson* is authority for the position that

[42] *Anderson* v. *Alnwick District Council* [1993] 3 All ER 613, per Evans LJ at 621.
[43] In support of this view, see Hale, *De Jure Maris*, chapter 3.
[44] Farnham, above note 15, para 369.
[45] W. Blackstone, *Commentaries on the Laws of England,* vol. 2 (Oxford: Clarendon Press, 1766) at 417.
[46] Farnham, above note 15, p. 1370, para 369.
[47] (1863) 10 HLC 593; 11 ER 1155. (Hereafter *Malcomson*).

the Crown cannot grant a several fishery (private property in a fishery) since the Magna Carta, and that in the absence of any such proven claim there remains a general public right of fishing on tidal waters.[48] The limitation on the creation of private fisheries is not complete. Thus *Malcomson* partially circumvents its own prohibition on new grants by permitting exclusive rights to be acquired by prescription, through evidence of long-standing exclusive use of a fishery, which cannot be traced back to a time subsequent to the Charter.[49] Interestingly, the law report actually records the view that the Magna Carta could not sustain the meaning placed upon it.[50] However, in delivering the unanimous opinion of the court, Mr Willes, J, stated that: 'The soil of "navigable tidal rivers," like the Shannon, so far as the tide flows and reflows, is *prima facie* in the Crown, and the right of fishery *prima facie* in the public. But for Magna Charta, the Crown could, by its prerogative, exclude the public from such *prima facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by Act of the Crown not later than the reign of Henry II.' Although earlier cases touched upon this matter, it is more than arguable that this was at least an example of judicial law-making. Of course, this would only be acceptable if the outcome was also politically desirable, and it seems clear that by the mid-nineteenth century there were strong social, economic and political reasons to support a strong public fishing industry absent any limitations under private law. Britain was at the forefront of the industrial revolution and needed to satisfy the appetites of a growing population.[51] Knauss notes that in 1866 a Royal Commission famously repealed in whole or part 65 pieces of legislation that limited fishing efforts. Capturing the free market political context rather nicely, he quotes Thomas Huxley, President of the British Royal Society and one of the most influential figures in regulation of British fisheries of the time:

> 'Now every legislative restriction means . . . a simple man of the people earning a scanty livelihood by hard toil, shall be liable to fine or imprisonment for doing that which he and his father's before him have, up to this time, been free to do. If the general interest clearly requires that this burden should be put on the fisherman—well and good. But if it does not—if indeed there is any doubt upon the matter—I think the man who has made the unnecessary law deserves a heavier punishment than the man who breaks it.'[52]

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[48] See Moore and Moore, above note 11, p. 8-18.
[49] *Malcomson* v. *O'Dea*, at 618. Also *Duke of Northumberland* v. *Houghton*, (1870) LR 5 Ex. 127; *Tighe* v. *Simnot* [1897] Ir. R. 140.
[50] Above note 47, at 603.
[51] J.A. Knauss , 'The Growth of British Fisheries During the Industrial Revolution' (2005) 36 *Ocean Development and International Law* 1-11.
[52] Ibid., p. 4. For the original see, *The Fisheries Exhibition Literature*, (London, William Clowes and Son Ltd, 1884), vol. 4, p. 18.

Moreover, the perpetuation of public rights to fish was wholly consistent with a more expansive fishing effort on the high seas and, indeed, off the coasts of other countries.

Political demands aside, as noted above, a number cases preceding *Malcomson* assert, or imply the existence of public right of fishing. Most such cases dealt with navigable rivers, rather than the sea, but several that the public nature of fishing rights on such rivers is the same as that on the open sea. The earliest noted appears to be the *Case of the Royal fishery of the river Bann in Ireland* (1610) which concerned fisheries in the tidal waters of a river.[53] Here the Court confirmed the pre-existing nature of Crown rights in the soil and fishery of a river, which could be granted to riparian landowners. It may be noted that the approach of the court in this and other cases was that the right was deemed to exist before the dispute in law, rather than emerge as a remedy of the court. Thus, in *Lord Fitzwalter's case* (1673), the right is implicitly accepted in the court's reasoning about the existence of a burden on a person claiming an exclusive right in a tidal river.[54] In *Warren* v. *Matthews* (1703) Sir John Holt held it was held that every subject of the common right may fish with lawful nets in a navigable river as well as in the sea.[55] Moreover, the court held that the Crown cannot bar such a right by the grant of a private fishery. However, this has position is somewhat misleading since in the same case the court sought to allow such title to be tested and it runs counter to the general line of other authorities, which accept exclusive fishing rights by way of ancient grant or usage.[56] In *Ward* v. *Cresswell* (1741), as quoted in the later case of *Bagott* v. *Orr*, the Court held that 'all the subjects of England of common right might fish is the sea; it being for the good of the commonwealth, and for the sustenance of all the people of the realm'.[57] In *Carter* v. *Murcot* (1768), the public right was again implicit in the need for the plaintiff bear the burden of showing the existence of a several fishery on a tidal river.[58] *Mayor of Orford* v. *Richardson* (1791) implicitly confirms the right to fish, although the Court was focused mainly on the procedural aspects of a how public and private claims are presented.[59] One of the most important cases was *Bagott* v. *Orr* (1801), which concerned the prima facie right to take fish between the high and low water mark and it is one of the few cases to actually articulate upon the nature of the right.[60] As the court stated: 'The right of fishing in the sea is acknowledged by all nations; it is universal, and part of the law of nations'.[61] Interestingly, the court was able to draw upon the now generally accepted

[53] (1610) Dav. Rep. 55; Salk. 137
[54] (1673) 1 Mod. 106. (1673) 84 ER 766.
[55] (1703) 6 Mod. 73, (1703) 87 ER 831.
[56] This point was explicitly reviewed by the US Supreme Court in *Martin* v. *Waddell's Lessee*, (1842) 41 US 367, 425.
[57] (1741) Willes' Rep. 265.
[58] (1768) 4 Burr. 2163, (1768) 98 ER 127.
[59] (1791) 4 TR 438; (1791) 100 ER 1106.
[60] (1801) 2 Bos. & Pul. 472; (1801) 126 ER 1391.
[61] Ibid, at 1393, citing Hugo Grotius.

authority of international law, and general agreement about the freedom to fish on the high seas, to justify a matter of domestic law. This seems to draw upon the idea advanced by Grotius that the seas are inexhaustible in their nature and cannot be improved upon by subjecting them to exclusive rights. The court also explicitly drew upon the authorities of Bracton and Hale, and shows the growing influence of doctrine in the development of the principle of a public nright to fish. Soon afterwards, *Rogers and Other* v. *Allen* (1808) restated, indirectly, the common right of the King's subject to fish in the sea, and noted that any grant of a several fishery much be one that dated back to the time of Henry II.[62] Again, *Duke of Somerset* v. *Fogwell* (1826) confirms that a franchised fishery could not be established after the Magna Carta.[63] Although this appears to suggest a reasonably coherent basis in law for the decision in *Malcomson, t*he restrictions of the Magna Carta were not restated in all cases.[64] However, these exceptional cases seem to be instances of limited reasoning, rather than any explicit acknowledgement that there exists a general right to grant several fisheries in tidal waters.

Since *Malcomson,* the public right to fish has been carefully observed by the courts, although it has been little developed and most of the case law on fisheries in tidal waters has been notoriously deficient in its discussion of this point. Indeed, there appears to be a degree of retrenchment from the high point of *Malcomson.* In *Neill* v. *Duke of Devonshire*, there is an indication that the decision in *Malcomson* was not being properly understood.[65] Thus Lord Blackburn stressed that '[i]t is not law, and this can never be too often repeated, that the Crown cannot grant a several fishery in tidal waters since Magna Charta. Such a statement is illusory and contrary to law."[66] Such a fishery could have been created if the fishery existed prior to the Charter. Furthermore, the court was carefully to uphold the core ratio of Malcomson, that 'no new exclusive fishery could be created by royal grant, though all fisheries were left untouched which were made several to the exclusion of the public not later than the time of legal memory'.[67] Lord Blackburn cited Hale with approval to show that although the King exercised ownership rights over the seas, the public also enjoyed a 'public common of piscary' that could not be exclusded unless a long standing private right of fishing had been enjoyed.[68] The court then went on to state those circumstances in which evidence of a private fishery could be adduced.

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[62] (1808) 1 Camp. 309; (1808) 170 ER 967. (citing *Ward* v. *Cresswell* and *Bagott* v *Orr*).
[63] (1826) 5 B. & C. 875; 108 ER 325.
[64] See for example, *Lord Fitzwalter's case*, above note 54; *Warren* v. *Matthews* above note 55; *Carter* v. *Murcot*, above note 58.
[65] Above note 39.
[66] Ibid, at p. 180.
[67] Ibid, p. 178.
[68] Ibid, p. 177.

Other relevant cases include *R*.v. *Stimpson* (1863), which held that a right of fishing in a tidal navigable river is prima facie public.[69] In *Murphy* v. *Ryan* (1868) the court stated the right to be limited the tidal parts of rivers. It did not apply to non-tidal parts of the river.[70] The court in *Bloomfield* v. *Johnston* (1868) denied the right application to Loch Erne because it was not tidal.[71] Interestingly, *Mayor and Corporation of Carlisle* v. *Graham and another* (1869) confirmed the limitations supposedly introduced by the Magna Charta, but held that when a tidal river changes its course, the new channel does not carry with it the several fishery on the old channel.[72] In *Brew* v. *Haren* (1877), Lawson, J. stated that the 'right of the public to take [seaweed] when floating … is as clear as their right to catch fish in the ocean.'[73] It thus confirmed the public right to fish and extended it to ancillary or related activities. Despite some earlier reservations about the reasoning in *Malcomson*, Lord Blackburn eventually accepted the rule in Malcomson in the *Goodman and another* v. *Saltash Corporation* (1882).[74]

During the twentieth century the public right of fishing was less frequently the object of litigation. In part this is likely to be the result of the fact that since the mid 19th century the commercial exercise of fishing rights was effectively put on a statutory basis.[75] Several cases reaffirmed the right, including *Lord Advocate* v. *Wemyss* (1900),[76] *Truro* v. *Rowe* (1902),[77] *Parker* v. *Lord Advocate* (1904),[78] and *Fitzhardinge* v. *Purcell* (1908).[79] In 1914, the Privy Council provided one of the more detailed modern review of the public right in *Attorney-General of British Columbia v. Attorney-General of Canada.*[80] Viscount Haldane noted that 'the legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them'.[81] Haldane compared the right to fish to the right of navigation, noting that the Crown regarded itself as

[69] (1863) 27 JP 678, 4 B & S 301.
[70] (1868) IR 2 CL 143. 'But whilst the right of fishing in fresh water rivers in which the soil belongs to the riparian owners is thus exclusive, the right of fishing in the sea, its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be publici juris, and so to belong to all the subjects of the Crown, the soil of the sea, and its arms and estuaries and tidal waters being vested in the sovereign as a trustee for the public.' (at 149).
[71] (1868) Ir . Rep 8 Cl 68.
[72] (1869) L.R. 4 Ex. 361, per Kelly, CB at 367-8.
[73] (1877) 11 IR CL 198.
[74] (1882) 7 App. Cas. 633; [1881-1885] All ER Rep 1076, at 1085.
[75] See especially, the Sea Fisheries Act 1843 and the Sea Fisheries Act 1868.
[76] [1900] AC 48.
[77] [1902] 2 KB 709.
[78] [1904] AC 364.
[79] [1908] 2 Ch. 139.
[80] [1914] AC 153, at pp. 168-71. The existence of the right was later reaffirmed in *Attorney-General for Canada* v. *Attorney General for British Columbia and other* [1930] AC 111.
[81] *Attorney-General of British Columbia* [1914], ibid, at p. 169.

'parens patri', responsible for protecting the rights of the nation.[82] From this the Crown's protective role evolved into an enforceable right for subjects of the Crown.

In *Stephens* v. *Snell* (1939), one of the few cases dealing with the enforcement of exclusive rights against the public right of fishing, the plaintiff succeeded in a case against a fisherman for trespass on his several fishery in the tidal waters of Axmouth harbour.[83]. Judicial consideration of the issue then lapsed for a long while until the the public right of fishing was strongly reaffirmed by the High Court in *Anderson* v. *Alnwick District Council* (1993).[84] In the context of justifying the extension of the rights to the matter of digging bait, the court stated: 'We base our decision, however, on wider grounds. Many of the authorities show that the underlying reasons for the public rights to navigate and to fish were economic. Sea fishing from boats or from the land was a vital source of food for many coastal communities. The public right to take fish from the sea and tidal waters was jealously guarded from Magna Carta onwards.'[85] An equally firm approach to protecting public rights was upheld in *Adair* v. *National Trust* (1998), when Girvin, J. stated that at 'common law there is a public right to take fish from the tidal waters around the Kingdom. The common law right extends to the tidal reaches of all rivers and estuaries and in the sea and arms of the sea within the territorial limits of the Kingdom.'[86] The position in *Malcomson* was accepted without hesitation. More recently the right was acknowledged in *Jan de Nul (UK) Ltd* v. *NV Royale Belge* (2000),[87] and *Isle of Anglesey County Council* v. *Welsh Ministers and others* (2009).[88] In the former, the question arose as to whether or not an interference with a public right of fishing constituted a public nuisance. The court restated the simple extent of the right as a 'right to fish in tidal waters is a right to take fish, including shellfish, by whatever means are considered effective, subject to any statutory restrictions' Interestingly, the High Court held that interference with such a right is capable of constituting a public nuisance.[89] In the latter case, the court also accepted the existence of the right, and indicated that a landowner could not 'carry out works which "substantially interfered" with public's fishery rights'.[90] However, the precise extent of this was not developed any further.

The attempt to tie the public right of fishing to the Magna Carta appears to be an example of judicial law-making and it is doubtful that this can sustained. At the very least it is a case of the court reading a political intention into a law far beyond the text is capable of

[82] Ibid.
[83] [1939] 3 ALL ER 622.
[84] Above note 42.
[85] Ibid, 624.
[86] *Adair* v. *National Trust for Places of Historic Interest or Natural Beauty and another* [1998] NI 33.
[87] [2000] All ER 1148, at para. 69.
[88] [2009] EWCA Civ 94.
[89] Above note 87, para 69
[90] Above note 88, para 68.

supporting alone. However, the right can be traced back in the common law at least as far back as 1610, and may have received earlier judicial recognition. Regardless of any concerns about the basis of the rule in *Malcomson*, it has since been accepted as good law. As Viscount Haldane stated in *Attorney-General of British Columbia v. Attorney General of Canada*: 'Since the decision of the House of Lords in *Malcomson v. O'Dea*, it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation'.[91] In light of this general proposition, the issue is not so much the existence of a general public right to fish, but rather whether this has been lawfully restricted in any particular area, and the extent to which it can be varied, lost or regulated. There appears to be evidence in the Domesday Book of many exclusive tidal fisheries. However, the true extent of these is difficult to gauge. The fisheries were not delimited, and may refer to fishing by more limited means, rather than be evidence of a widely drawn private right.[92] Hall considers such grants to be rare, and limited to those places capable of sustaining exclusive possession.[93] This seems to infer that such private fisheries were closely connected to the holder's capacity to exercise some degree of practical exclusion of others from the fishing ground. They also appear to be limited to estuaries and waters around certain towns.[94] There is little evidence of such rights extending to tidal waters at a distance from the shore. However, this does raise interesting questions about the relationship between the public right to fish and the freedom to fish on the high seas.

The Nature of the Public Right to Fish

General acceptance of the right and its material extent

As discussed above, there legal recognition, and a general acceptance among expert commentators as to the existence, of the public right to fish.[95] Unfortunately, this is often considered in short measure. In 1875, Hall described the 'public or general right of fishing in the sea' as 'a beneficial privilege enjoyed by British subjects since time out of mind'.[96] He goes on to state that the precise origins, whether a reservation by the people of a right, or the public

[91] [1914] AC 153, at 170.
[92] See Moore and Moore above note 11, p. 4.
[93] Above note 14, p. 5.
[94] See for example. *Henry Blake and Johyn Goodman, the Younger* v. *The Mayor and free Burgesses of the Borough of Saltash*, (1882) 7 App. Cas. 633.
[95] This is discussed in more detail by Moore and Moore, above note 11, chap. XIX.
[96] Above note 14, p. 46.

grant from the King, are immaterial.[97] It is suggested that the nature of the original right is linked to the scope of the right. In this context one general theme is important – the link between ownership of land and fishing rights on superadjacent waters. It appears that the right to fish was originally regarded as deriving from ownership of the soil over which the water flowed.[98] Property rights attached to land, certainly in the feudal tradition, and interests in the water over land were ancillary to this. Indeed, the general position in respect of fisheries under the common law is to regard them, prima facie, as profits. There is a presumption that the owner of the soil (land) retains ownership of the fishery in the water above the soil. The treatment of fisheries as an incident of land ownership continues. Thus Halsbury's indicates that rights to swimming fish pass with the land and are 'an incident of the ownership of the soil'.[99] If this holds true, then the public right to fish may be limited by the extent to which ownership of land, or the seabed, was conceived. As noted below, this indicates that it was, at least originally, confined to a small margin of coastal waters. Another point to note is that evidence may be adduced of the grant of the right to the fishery separate from ownership of the soil.[100] Like other forms of property, it is not uncommon to find varying incidents of ownership vested in different persons, to varying degrees.

As a common law institution, the public right to fish developed piecemeal.[101] This makes it difficult to ascertain a single coherent or principled statement of the nature of the right. We can survey various cases and draw out aspects of the right. To start with, the right clearly permits fishing from boats, and this is distinct from the public right of navigation.[102] It is not limited to mere fishing, but includes necessary ancillary rights. An incident of the public right to fish is the right to use the sea shore for purposes essential to the enjoyment of the right of fishery.[103] This is confirmed in *Anderson* v. *Alnwick District Council,* where it was held to extend to ancillary rights, such as the right to cross the foreshore in order to exercise the right.[104] The same case also confirmed that it included the right to collect bait from the foreshore as would be necessary to facilitate the public right of fishing.

A second observation is that regardless of judicial accounts of the nature and scope of the right, there are now in place many more modern restrictions on the right than were articulated during its early development. These are predominantly set out in legislation, for it remains within the authority of Parliament to legislate such matters as it sees fit. Of course, this

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[97] Ibid.
[98] *Att. Gen* v. *Emerson* [1891] AC 649; *Hindson* v. *Ashby* [1895] 2 Ch. 1; *Neill* above note 39, at 152.
[99] 4th ed, vol. 18, para 616.
[100] Blackstone, above note 45, vol. II, p. 39.
[101] See Girvin, J. in *Adair* v. *National Trust*, above note 86, at 42.
[102] *Anderson*, above note 42, at 621.
[103] Hall, above note 14, pp. 48-9.
[104] Above note 42, at 621.

may be subject to certain limitations on the authority of Parliament.[105] The public right to fish under the common law developed at a time when fisheries were not threatened by depletion, and there was less concern with protection of the environment. Such matters are not fully accounted for in the common law right. However, as Girvin J. noted in *Adair*, the common law right is so entrenched that it is for the legislature, not the courts, to regulate the common law right.[106] Such has been done through various fisheries legislation.[107] Such legislation is quite extensive, and it goes beyond the scope of this report to detail such legislative controls on sea fisheries. It may also be noted that Parliament may grant exclusive fisheries in tidal waters.[108] This much is now entrenched in statute, as per section 1 (3) of the Sea Fishery (Shellfish) Act 1967.

A final point to note here is that is not perfectly clear is whether the public right of fishing is a right or a liberty. A liberty (or privilege) is normally understood as meaning that a person is free to do something, whereas a right is usually conceived of as a claim against another person. In the case law, both terms are used to describe public fishing.[109] However, a preponderance of the cases indicates that the public right of fishing is more closely aligned with a liberty or privilege. Thus most cases have concerned the use of the public right as a defence against interference with the pre-existing liberty. There are no examples of the right being exercised in a way that requires other persons to do something positive to ensure the exercise of the right. As such the use of the term 'right' seems to be a more limited acknowledgement of the fact that it is legally recognised entitlement.

Holders of the Public Right to Fish

Common law authorities indicate the right vests in the 'public' or in subjects of the crown. Thus the right can be exercised by individuals qua members of the public. There is nothing in principle limiting its exercise by individuals in a commercial context. In *Anderson*, the right to collect bait which is ancillary to the right to fish, was limited to bait digging to facilitate fishing; but it was not permitted for commercial sale.[110] However, the limitation in this case only extends to ancillary rights, and not the right to fish itself. Historically, the public right to fish

[105] An interesting possibility would be the extent to which human rights issues may restrain the allocation of fisheries resources in the way in which the HRC dictated for Iceland Above note 5, and the accompanying text.
[106] Above note 86, at p. 43.
[107] See for example, Sea Fisheries Act 1843; Sea Fisheries Act 1868; Sea Fisheries Regulation Act 1888; Sea Fisheries Regulation Act 1966; Sea Fisheries Act 1968; Sea Fisheries (Wildlife Conservation) Act 1992.
[108] See *AG for British Columbia* v. *AG for Canada*, [1914] AC 153; *Queen* v. *Robertson* (1882) Can. Sup. Ct. 52.
[109] See for example, *Neill* v. *Duke of Devonshire* above note 39, at 177-9.
[110] Above note 42, at 624.

right appears to be limited to British nationals, although this does not appear to have been tested in court. This is linked to the political motivation surrounding the extension of exclusive control over fishing in coastal waters, rather operating as some form of right enjoyed exclusively by nationals. There is no evidence to suggest that fishermen of any nationality could not fish in coastal waters so long as they were fishing from Britain, rather fishing as distant water fleets. Wisdom indicates that a foreign fishing vessel would be entitled to fish in British waters so long as it complies with any statutory permission to do so.[111] The most significant entitlement to fish is afforded to vessels of other member States of the EU under the common fisheries policy. In most cases, the right has been asserted by individuals and used to challenge claims of exclusive fisheries. In practice there would seem to be little point in limiting the right, as exercised for recreational purposes, to purely British nationals given the practical problem of controlling diffuse small scale low-impact fishing.

For commercial fishing purposes, it is important to note that the common law has long since been overtaken by statutory regulation. Legislation does not generally remove the right, but determines how and when it can be exercised. This may limit the exercise of fishing rights in practice considerably. However, apart from instances of several rights being created in shell fisheries, such regulation has generally been limited to setting conditions for the exercise of fishing rights, such as the use of particular gear, or fishing seasons. It is crucial to understand that there is nothing that limits the right of the government to regulate fishing activities. Of course, questions remain as to whether such regulation that effectively reduced fishing to exclusive private property would be permitted, and if so under what circumstances it would be deemed to be either politically or legally permissible.

The Nature of the Crown's Responsibilities.

It is clear that the Crown originally exercised ownership rights over coastal waters, and this extended to the fish, as profits thereof. Some writers have argued that the Crown's original position of ownership has developed into a form of trusteeship. Thus Farnham notes that the King would have had neither the time nor the inclination to exploit the fish for his own benefit, nor prevent his subjects fishing as they needed.[112] This and subsequent efforts to limit the power of the Crown resulted in the formulation of the idea that the Crown held the rights to fish in trust for the people.[113] However, there is no explicit basis for this 'doctrine of trust' and in the *Case of the Royal Fishery of the Banne*, the court explicitly refused to deal with a fishery at the

[111] *Wisdom*, above note 16, p. 177.
[112] Farnham, above note 44, para. 369.
[113] Ibid, para 368.

King's pleasure in such a way.[114] Farnham accepted that the trust doctrine did not emerge until the after the deposition of Charles I. However, quite how the Crown's right to deal freely with fisheries that it owned became limited is unclear. American law, in contrast to English law, developed the public trust doctrine to accommodate this tension between ownership of resources and public rights.[115] Such an approach is peculiar to US jurisprudence and did not evolve in the English common law. Viscount Haldane, in the *AG of British Columbia*, indicated that the Crown acted as 'parens patri' in order to protect the interests of persons engaged in fisheries.[116] This form of protection then evolved into a legal right. All that appears to remain is a responsibility of the state, either by way of legislative control, or judicial protection, to ensure that the public right of fishing is not unreasonably fettered, or infringed by unfounded private claims to exclusive fishing in tidal waters.

Geographic Scope of the Public Right to Fish

The geographic scope of the public right to fish requires careful consideration because the spatial jurisdiction or sovereignty of the State has evolved since the earliest times when any public right was asserted. The general position is that the public have a 'liberty of fishing in the sea and the creeks or arms thereof'.[117] This includes fishing upon the foreshore between the high and low water mark, as well as the taking of shellfish,[118] so long as such have not been reduced to the possession of another by cultivation.[119] The extent of fishing on creeks or arms of the sea has been much discussed. In general the right is limited to the tidal part of a river.[120] The preferred extent of tidal waters is where the water flows and reflows.[121] This means that the precise limits of the tidal part of a river is a question of fact

Historically speaking, the seaward extent of the public right of fishing is not clearly stated in the common law. All that can be inferred is that it was linked to the extent of the Crown's ownership of the sea around the coast of England. This can be traced back to the writings of Thomas Digges (1589) [122] and was strongly maintained by English jurists.[123] A

[114] Davies 149. Admittedly this was a case concerning riparian fisheries.
[115] See S. Macinko and D.W. Bromley, 'Property and Fisheries for the Twenty-first Century: Seeking Coherence from Legal and Economic Doctrine' (2004) 28 *Vermont Law Review* 623.
[116] Above note 80, at p. 169.
[117] Hale, above note 21, p. 11(reference to original page)
[118] *Bagott* v. *Orr*, above note 60. Also *Corporation of Truro v Rowe*[1901] 2 KB 870, 878.
[119] *R.* v. *Downing* (1870) 23 LT 298.
[120] *R.* v. *Stimpson* (1863) 4 B & S 301.
[121] *West Riding of Yorkshire Rivers Board* v. *Tadcaster RDC* (1907) 97 LT 436; *Ingram* v. *Percival* [1968] 3 All ER 657.
[122] T. Digges, above note 21, p. 185.
[123] See R Callis, *Reading of the famous and learned Robert Callis, esqr, upon the Statute of Sewers* (1622), 4th edn, ed. W.J. Broderip (London, J Butterworth and Son, 1824); Sir J. Boroughs, *The Sovereignty of the*

central role can be attributed to John Selden's highly influential text, *Mare Clausum* (1635), which sought to justify King Charles I's ownership of the British Seas.[124] Such ownership extended the water and the seabed, and all things therein.[125] This posited ownership of fish in the Crown and there is evidence to support the Crown treating the sea and fisheries as property. The Crown's right of property in territorial waters was reaffirmed in the important cases of *Gammell v. Commissioners of Woods and Forests* (1859)[126] and the *Whitstable Fisheries case* (1864).[127] Unfortunately, the precise extent of the Crown's sovereignty or ownership is not made clear in these cases. Thus, in the *Whitstable Fisheries case*, this is stated to be the assumed distance of a cannon-shot from the shore.[128] There are indications that this might have been regarded as more extensive and subject only to the extent that the King could control. Indeed, in *Attorney-General for British Columbia*, Viscount Haldane considered it was clear that Lord Hale meant to include in the dominion of the Crown something much wider even than this' (i.e. 3 mile limit).[129] However, there was little consideration of such matters in the common law prior to the nineteenth century. As indicated above, most disputes related to conflicts between public fishing rights and claims of excusive fisheries, and the latter were limited to coastal waters near to shore and arms of the sea. Beyond coastal waters it was clear the freedom of the high seas prevailed and so there was no need to assert some form of public right to fish derived from Crown ownership of the seas. It may also be noted that international assertions to wider maritime dominion had lapsed before many fisheries cases came before the courts., and there was little concern with the extent of the Crown's rights of ownership in the seas until the nineteenth century.

R. v. *Keyn* (1876) is taken to be authority that the common law did not extend beyond the low water mark.[130] However, this case concerned the assertion of criminal jurisdiction, and it is doubtful that it in anyway limited other common law doctrines, particularly the public right to fish. Since this time, the nature of the Crown's rights in the territorial sea ceased to be couched in terms of ownership, but rather sovereignty, as this became the accepted juridical

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British Seas (Edinburgh, W Green and Son, 1633), reprinted London (1739) 43; Sir E Coke, *The Fourth Part of the Institutes of the Lawes of England* (London, 1644) c 22, 142; J. Godolphin, *A View of the Admiral Jurisdiction* (London, Godbin, 1661); R. Zouche, *The Jurisdiction of the Admiralty of England Asserted* (London, F. Tyton and T Dring, 1663), p. 20; R. Codrington, *His Majesty's Propriety, and Dominion on the Brittish Seas Asserted: together with a true account of the Neatherlanders insupportable insolencies* (London, T Mabb, 1665), p.1;Lord Chief Justice Hale, *De Jure Maris*, extracted from Moore, above note 21, p. 367. Sir P Meadows, *Observations Concerning the Dominion and Sovereignty of the Seas* (London, E Jones, 1689), p. 42.

[124] J. Selden, *Mare Clausum* (1635), trans M Needham (London, 1652). See also See Sir John Boroughs, *The Sovereignty of the British Seas* (London, 1633).

[125] A position adopted by Hall, above note 93, pp. 2-7.

[126] (1859) 3 Macq. 174.

[127] *Gann* v. *The Free Fishers of Whitstable* (1865) XI HLC 191; (1865) 11 ER 1305.

[128] Above note 11, p. 1316.

[129] Above note 80, at p. 169.

[130] (1876) 2 Ex. D. 63.

nature of the territorial sea. This does not however, restrict the Crown's assumed proprietary interests in the waters or seabed of the territorial sea under the common law.[131]

It is generally accepted that the domestic limits of the territorial sea must accord with international law. As is well known by students of the history of the law of the sea, the breadth of the territorial sea was long a matter of controversy and variation in practice between States. Until the mid-18th century the existence and limit of territorial waters was heavily debated by scholars. In 1744, Bynkershoek formulated the cannon-shot rule, which asserted that exclusive control over coastal waters extended as far as could be defended by the shot of a cannon.[132] At the same time Scandinavian States asserted exclusive control over a belt of waters extending to approximately 1 league. It was not until the late 18th century that these discreet limits coalesced in a more uniform limit of 3nm. This limit was generally adhered to by maritime powers including the United Kingdom, but never formally agreed, or accepted by all States as a general rule of international law. This position continued until the United Nations Convention on the Law of the Sea 1982 (LOSC) set the limit of the territorial sea at 12 nautical miles.[133]

As a result of the uncertainty in the common law, the seaward limit of the public right to fish has since been set by statute. The Territorial Waters Jurisdiction Act 1887 assumed a seaward limit of 3 nautical miles. However, the Act did not actually delimit the territorial sea at 3nm; section 7 merely refers waters 'deemed by international law to be within the territorial sovereignty of Her Majesty'. To the extent that international could be said to limit the territorial sea to 3 miles, then this might have fixed the limits of the territorial sea.[134] This was not a particularly clear example of legislative drafting. Despite this, the actual limit was not adjusted until 1987, when the territorial sea was extended to 12 nautical miles for waters around the UK.[135] Even now some anomalies remain. For example, the 1987 Act provides that unless provided for by an Order in Council this does not apply to the Channel Islands. Unlike Jersey, which was subject to an Order extending its territorial sea, the territorial sea around Guernsey remains limited, as a matter of domestic law, to 3nm. This has since given rise to disputes concerning the states authority to regulate fisheries within what are normally considered to be territorial waters.[136]

Historically, there has been an important distinction between territorial waters and the high seas. Within territorial waters, foreign nationals enjoy no rights to fish. Thus the public right of fishing is enjoyed by nationals within territorial waters, subject to any limits resulting

[131] See Barnes, above note 1, pp.190-8.
[132] C. van Bynkershoek, *De Domino Maris* (1744), tran RVD Magoffin (London, Oxford University Press, 1923), chap. 2.
[133] Article 3 LOSC.
[134] The point is discussed by Fulton, above note 25, pp. 591-3
[135] Section 1(1)(a) Territorial Sea Act 1987, c. 49.
[136] *Jersey Fishermen's Association and others* v. *States of Jersey* [2007] UKPC 30.

from the grant of exclusive fisheries. On the high seas, nationals of all States enjoy the right to fish on the high seas. The right is granted to States and may be exercised by their nationals, subject to limits on the States rights.[137] Such limits include treaty obligations, general duties to conserve and manage living resources, and to cooperate with regard to conservation and management. There is also a duty to have due regard to other users of the high seas. The high seas are generally defined as those areas beyond the exclusive jurisdiction of the coastal State. Initially this pertained to areas beyond the territorial sea, however far this stretched. However, under the LOSC, the high seas are now limited to waters beyond 200nm since States may claim an exclusive economic zone (EEZ).[138] Within this zone States enjoy sovereign rights for the purpose of exploring and exploiting living resources. This allows States to limit fishing opportunities to their nationals within the 200nm EEZ.

It has not been confirmed whether seaward extent of the public right to fish under the common law has kept pace with the limits of the territorial sea under international law or indeed the exclusive economic zone or equivalent fisheries zone.. There is some support for the view that the public right to fish is co-extensive with the territorial sea. The Australian High Court in *Commonwealth* v. *Yarmirr* accepted that the common law followed Australia's extended jurisdiction from 3 to 12 nm.[139] From this is might be presumed that if the public right to fish is derived from the Crown's ownership of the soil, then the right to fish will be coextensive with the geographic extent of the Crowns ownership rights. Until the mid-19th century these were not restricted as to their seaward extent. For a period from 1887 until 1987, the territorial sea was prima facie limited to 3 nm, and it would appear reasonable to assume the public right to fish was also so limited. Beyond 3 nm, there remained the freedom to fish on the high seas, which rendered the need to argue a public right moot. It seems inconceivable that a vacuum in fishing opportunities was intended to result from the extension of the territorial sea to 12 nm without any commensurate extension in public fishing rights to the same extent. For this reason it seems sensible to hold that since 1987, the public right to fish has at least been extended to 12 nm, co-extensive with the UK territorial sea. In principle, there seems no reason why this entitlement does not also extend to waters forming part of any exclusive fisheries zone.

Limitations on the Right

The public right of fishing is not an absolute right. Thus it may be subject to regulation and limitation by the State. As a matter of principle this is quite reasonable. Any liberty if used to

[137] Article 116, LOSC.
[138] Articles 56-7 LOSC.
[139] [2001] HCA 56, at paras. 74-5.

the absolute degree will be destructive of, or harmful to, the liberty of other persons. More specifically, the unrestricted use of a public right to fish may result in the destruction of fishery.[140] Capturing this view, the court stated in *Lord Leconfield and others* v. *Lord Lonsdale* that '[i]n the sea and tidal parts of rivers the public have the right of catching all the fish they can by all means which are not inconsistent with the equal rights of each other'.[141] Although this was an obiter remark, it is consistent with the nature of an entitlement held by the public at large. The common law might be viewing as placing some specific limits on fishing, such as limiting the quantity of fish that may be appropriated, gear to be used and times of fishing. For example in *Warren* v. *Matthews*, the court refers to 'lawful nets' as a constraint on fishing. However, the fact is that any general requirement of reasonable use, or any specific from of Writing at the turn of the twentieth century, Moore and Moore noted that the public right to fish must be exercised reasonably, and with respect to any applicable statutes.[142] A final point to note hear is that although such rules do not destroy the public right to fish, rather they articulate how the right is to be exercised.

Establishing a Claim to a Private Fishery

Given that the one of the most significant limitations on the public right of fishing is the existence of a private or several fishery, it is helpful to consider how such can be established under the common law, and when this will be deemed to exclude the public right. A line of authorities indicates that a person seeking to establish the existence of an exclusive fishing right has the burden of proof. In *Lord Fitzwalter's case*,[143] Hale CJ held that a person claiming a free fishery, several fishery or commons of fishery, must provide evidence that he has the claimed right of fishing. Thus the burden is on the party showing the public right of fishery has been removed. This position is asserted in *Carter* v. *Murcot*. 'If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right, though the presumption is against him, unless he can prove such a prescriptive right.' This would require them to show on the balance of probabilities that the right exists. As noted above, this can be done by establishing evidence of title going back to before 1215. A second option is to establish, as per *Malcomson*, evidence of long-standing use. This is important, as the courts have been prepared to accept such evidence to establish an exclusive fishery. In *Loose* v. *Castleton*, the Court of Appeal held that once evidence was adduced of a long standing usage, the

[140] Farnham, above note 44, p. 1393, para 381.
[141] (1870) L.R. 5 C.P. 657, at 665.
[142] Moore and Moore, above note 11 , p. 96.
[143] (1673) 1 Mod. 105; (1673) 86 ER 766.

burden then falls upon the party claiming a public right to show that the origin of the fishery is in fact modern, i.e. dating from 1189.[144]

Mere evidence of title, 'a paper title', is not sufficient to establish a private right of fishing. The common law also requires 'possession', or rather evidence of acts of ownership.[145] The quality of such acts depends on the circumstances. For example, proof of ownership of a fishing weir, or other means of taking fish may be evidence of ownership of the entire fishery.[146] Acts such as the fixing of stakes, building of piers or boathouses, taking of gravel, and other cultivating activities have been accepted as evidence of ownership of the soil, and hence right of an exclusive fishery.[147] Of the forms of evidence, Moore and Moore indicate that evidence of netting is most important as this was the most common form of taking fish.[148] Such acts have generally been limited to tidal waters immediately adjacent to the coast. This is because it is simply impractical to manifest long-standing acts of ownership at a distance from the shore. Absent any evidence of title and acts of ownership the public right of fishing must be deemed to exist.

The Effect of Establishing a Private Right

Once title to fish in tidal waters has been lawfully and conclusively established, then no fishing by the public can displace the right.[149] Interruption of a several fishery does not destroy the right vested in the holder.[150] Normally, long evidence of use is allowed to support a claim that a right by prescription exists. However, evidence of use does not displace a prescriptive right that is also supported by written title and evidenced by possession.[151] Thus Moore and Moore to conclude that 'once a several fishery always a several fishery.[152] This is based upon the idea that any fishing in an area subject to a several fishery is either by express or implied permission by the owner. Once a public right has been excluded, then it cannot be regained. Of course, this ignores the possibility of the Crown reacquiring the several fishery and then reverting it back to a general public use. Evidence of such acquisition and reversion would need to be established and no examples of this being done have been found. One exception to this may be in the case where title to a several fishery has not been conclusively established, in which case, the long

[144] (1981) 41 P. & C.R. 19, per 30-1 Bridge, L.J. relying upon *Malcomson* v *O'Dea.*
[145] See *Neill* v. *Duke of Devonshire*, above note 39. Also, *Blount* v. *Layard* [1891] 2 Ch. 681.
[146] See: *Gabbet* v. *Clancy* (1845) 8 Ir. L. R. 299; *Malcomson* above note 13; *Neill* above note 39; *Att.-Gen.* v. *Emerson* [1891] AC 648; *Lord Advocate* v. *Lord Lovat* (1879) 5 AC 273; *Powell* v. *Heffernan* (1881) 8 L.R. Ir. 132.
[147] See *Partheriche* v. *Mason* (1774) 2 Chitty 258; *R.* v. *Aresford* (1786) 1 TR 358.
[148] Above note 11, p. 148.
[149] *Neill* v. *Duke of Devonshire* above note 39.
[150] Ibid, 170.
[151] Ibid, 156.
[152] Moore and Moore, above note 11, p. 152.

standing evidence of public right of fishing may be used to dispute the existence of any such title.[153] One should also distinguish a general public right of fishing from a right enjoyed by a more limited class of persons. Such a right might be confused with a general public right to fish. For example inhabitants of towns or parishes have asserted rights to take fish in fisheries owned by public bodies. Such rights to take fish have been difficult to establish, but in the case of *Goodman* v. *The Mayor of Saltash*, the House of Lords recognised that although the corporation held a several fishery, this was not an absolute or unqualified title for their sole benefit, but one held in trust for the benefit of inhabitants of the borough as evidenced by their usage.[154] Thus inhabitants of the borough might fish in the area, but not the wider public.

Concluding Remarks

There exists a public right to fish for British vessels in British waters. This right emerged under the common law and precedes much public regulation of fisheries. As such, it might be viewed as supporting a presumption that fishing is permitted unless specifically restricted. Its origins in law can be traced back with some certainty to 1610 and the *River Bann fishery case*, and it has been considered in numerous cases since, most recently being confirmed in *Isle of Anglesey County Council* v. *Welsh Ministers and others* (2009). In 1863, in the case of *Malcomson* v. *O'Dea*, the House of Lords confirmed the right to have existed since the Magna Carta (1215). Although this seems to be a legal fiction, it has since been generally accepted by judges and commentators.

The public right to fish exists in coastal waters extending to 12 nm and probably as far as the outer limits of an exclusive fisheries zone. It includes tidal waters and arms of the sea. It exists unless it can be established that there was granted a private fishery prior to the Magna Carta or which has since been evidenced by long-standing use. The right is held by individuals as members of the public, although the category of persons is untested. It extends to all fishing types and techniques in the territorial sea. It includes fishing from boats, and allows for certain ancillary rights such as bait digging and permits access to the foreshore to facilitate fishing. It may be restricted by legislation. This has frequently be done under the various Sea Fisheries Acts, and associated delegated legislation. It is also subject to a "reasonable use" requirement under the common law. There is a general responsibility on the State not to unreasonably fetter the right.

[153] Ibid, p. 153.
[154] (1882) 5 CPD 431; 7 App. Cas. 633.

If the general position is that there exists a general right to fish subject to any licensing or regulatory limitation deemed necessary to ensure the proper conservation and management of the fisheries then this raises at least one question: could such a public right be used to challenge fisheries legislation in general? The lack of such challenges in the past suggests that this in unlikely. However, the absence of challenge might simply be because fisheries legislation has not so far fundamentally challenged the existence of a public right to fish. Also, it is probably undesirable that a general liberty to fish could be used to challenge statutory rules that properly seek to limit fishing effort in order to ensure sustainable fishing. That said, at the time of writing, there is much interest in the use of rights-based fishing mechanisms gin, and these present a different order of change to fishing entitlements. These can significantly alter the nature of fisheries because they can result in permanent and exclusive rights being vested in a limited category of persons. As the experience of Iceland shows, unless such measures are strongly justified in terms of conservation and management needs, then they are vulnerable to challenge by fishing interests that have been disenfranchised. If nothing else, this cautions a degree of sensitivity in the design of fisheries regimes, especially those that may limit public entitlements.